

RECORD OF TRIAL

COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

SUFYIAN BARHOUMI

ALSO KNOWN AS:

**ABU OBAIDA
UBAYDAH AL JAZA'IRI
SHAFIQ**

No. 050006

VOLUME ____ OF ____ TOTAL VOLUMES

**1ST VOLUME OF TRANSCRIPT: R. 1-218
MARCH 2 AND APRIL 26, 2006 SESSIONS
(ONLY REDACTION IS ON R. 20)**

United States v. Sufyan Barhoumi, No. 050006

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript, Prosecution, Defense and Review Exhibits constitute the "record of trial," and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and *United States v. Castleman*, 10 M.J. 750, 751 (AFCMR 1981) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, *see* Clerk of Military Commission administrative materials in Volume III.

VOLUME
NUMBER

SUBSTANCE OF CONTENTS

ALLIED PAPERS Not part of "record of trial"

- | | |
|-----------------------|--|
| I¹ | Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications) |
| II¹ | Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866) |

¹ **Interim volume numbers. Final numbers to be added when trial is completed**

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VIII²	Transcript R. 1-218 (Mar. 2 and Apr. 26, 2006 sessions)
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² Interim volume numbers. Final numbers to be added when trial is completed

VOLUME I OF TRANSCRIPT

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Index of Transcript

FIRST SESSION:

March 2, 2006

<u>DESCRIPTION</u>	<u>PAGE #</u>
Appointing Orders presented to Commission (REs 5 and 30)	1
President's Reason To Believe Determination presented to Commission (RE 1)	1
Appointing Authority's Approval (RE 3) and Referral (RE 4) of Charges are presented to Commission	2
Accused, Presiding Officer, and all detailed counsel are present	2
The Presiding Officer was properly appointed and sworn	3
The Accused's translator was qualified, sworn and present at the hearing	4-5
The Prosecutors were properly detailed and sworn. The Chief Prosecutor documented his detailing decision (RE 11)	6
The Defense Counsel were properly detailed and sworn. The Chief Defense Counsel documented his detailing decision (RE 6)	6-7
The Presiding Officer explained rights to counsel to the Accused	7-9; 11-12
The Accused understood his rights to counsel	8-9
The Accused said he needed more time before deciding whether he wanted to keep Captain Faulkner as his detailed military Defense Counsel	9
The Accused said he wanted Mr. Foreman as his civilian counsel,	

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however, he had not communicated with Mr. Foreman	<u>10</u>
Captain Faulkner said he would help the Accused communicate with Mr. Foreman, and would assist the Accused in deciding what Counsel he wanted	<u>13-14</u>
Captain Faulkner said he wanted help setting up a telephone call between the Accused and his family—the Presiding Officer suggested that Captain Faulkner ask the Command and Prosecution for help—and then if necessary seek help from the Presiding Officer	<u>16-18</u>
Authentication for R. 1-19	<u>19</u>

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SECOND SESSION:	
APRIL 26, 2006	
Persons present	<u>20, 37</u>
Translation information	<u>20-21</u>
Mr. Foreman, Civilian Defense Counsel, is absent because his security clearance has not yet been approved—Defense requests a delay in the litigation of the defense discovery motion, and the motion to abate the proceedings (the abatement motion concerns the conflict between the President’s Military Order and Military Commission Order Number 1)	<u>21-22</u>
The Presiding Officer explained to the Accused his various rights to counsel. The Accused requested Mr. Foreman and Captain Faulkner as his defense counsel.	<u>22-25, 37</u>
The Prosecutor read the charges	<u>26-37</u>
The Presiding Officer approved the Defense request to defer voir dire and challenge of the Presiding Officer.	<u>38</u>
The Presiding Officer explained Protective Orders (<u>REs 15, 16 and 46</u>). The Prosecutor stated that the Colonel who testified would be referred to by an initial, rather than his name.	<u>38-41</u>
Current Presiding Officer Memoranda and Filings Inventory are (<u>REs 27 and 45</u>).	<u>41-42</u>
The motion to abate is (<u>RE 19</u>), the discovery motion is (<u>RE 37</u>), the motion objecting to the transfer of the Accused from Camp 4 to Camp 5 is (<u>RE 38</u>). The first two motions were deferred, and the third will be litigated at this session.	<u>42-43</u>

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Defense direct examination of Colonel B	<u>44-111</u>
COL B testified that he is the Commander, Joint Detention Group. Camp 5 is a maximum security facility modeled after a federal prison in Miami, Indiana (R. 46). It has the capacity to hold up to 100 persons. The cells are concrete. The doors are metal, with a “bean hole.” The bean hole is used to pass food or the detainee can put their hands through the hole so that they can be shackled (R. 46). The bean hole has a door (R. 48), and is 12 inches by 12 inches (R. 50). Camp 5 has two levels or floors, and four separate wings (R. 47). Each cell has a metal bunk, a western-style toilet and a water fountain (R. 48). The shower facility is at the end of the hallway. There are two fenced recreation yards at Camp 5 (R. 48). Either one or two persons use each recreation yard at a time (R. 50).	<u>44-49</u>
A detainee cannot see another detainee when he is in his cell, except he could see another detainee’s hand if the hand were outside a bean hole, and the detainee looked outside his bean hole (R. 51).	<u>51</u>
About 75 detainees are in Camp 5 (R. 51). Camp 5 opened in May 2004 (R. 52). Camp 5 detainees received 2 hours of recreation per day, unless in disciplinary status, then its 30 minutes to 120 minutes per day (R. 52). Due to a recent change, even disciplinary detainees get 2 hours of recreation per day (R. 68). Exercise times are rotated amongst the tiers so that no detainee is constantly exercises at night.	<u>52-53, 68</u>
There are four prisoner levels: highly compliant, compliant, discipline, and segregation (R. 54). Segregation detainees are in Camp 3, Oscar Block (R. 55). Including those detainees under Commission charges, at Camp 5, eight to ten detainees at Camp 5 are “highly compliant” (R. 55-56).	<u>54-56</u>
Camp 4 is a communal camp. It has five, 40 person blocks. Each	

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block, has four, ten person bays. A latrine and shower facility are located in the center of each block. Camp 4 has much greater freedom of movement than Camp 5. Twenty persons can gather in a bay area (R. 56). A large recreation area, includes a volley ball court, basketball court, and a soccer field. This recreation area is in the center of the compound (R. 56-57).	<u>56-57</u>
When the population of Camp 4 goes below 175, COL B and his staff review records for replacements. A minimum of 6 months of good behavior is required (R. 58). The person with the longest period of good behavior is at the top of the merit list. Assignment may be vetoed by the Interrogation Control Element (R. 59). 30-50% of those offered transfer to Camp 4 decline to be transferred (R. 60). Camp 1 is for compliant prisoners—typically detainees moves from Camp 1 to Camp 4 (R. 60).	<u>58-61</u>
The highly compliant detainees at Camp 5, that are not under Commission charges are there because of threats to harm them-they are at Camp 5 for their own safety (R. 62).	<u>62</u>
Camp 6 is a new facility under construction, designed to house 225 detainees. It is modeled after a county prison in Michigan (R. 62). It has individual cells, but also has a pod allowing up to 20 detainees to gather (R. 63). It also has a large recreation yard for soccer (R. 64). Camp 6 will have some of the freedom of Camp 4, but cells like Camp 5.	<u>62-64</u>
There were meetings to discuss camp consolidations, and Major General Hood approved the recommendation to consolidate all detainees under Commission charges at Camp 5 (R. 69-71). The JTF decided to close Camps 2 and 3, except discipline and segregation blocks (R. 71). The overall goals are to keep the population at Camp 5 at 80% of capacity, maintain Camp 4 at about 175 population, and keep the remainder of the detainees at Camp 1 (R. 71). In a typical month there are	

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close to 500 transfers between camps (R. 73). The big issue at the briefing was closing camps. Prior to the consolidation, the ten Commission detainees were located as follows: three in Camp 5, three in Camp 4, two in Camp 1, one in discipline and one detainee he was not sure about (R. 76-77).	<u>69-77</u>
The Accused status is highly compliant (R. 78). Although a few detainees want to leave Camp 4, most want to be there. Others in Camps 1 and 5 want to be transferred to Camp 4 (R. 79-80). Camp 4 has more recreation time and options.	<u>78-80</u>
COL B uses Army Regulations 190-8, 190-47 and the Geneva Conventions as guidelines for detainee treatment (R. 83). Those pending trial should be segregated from other detainees (R. 84), but there are inadequate resources for complete segregation (R. 87-88). These guidelines do not precisely fit because none of the detainees have been convicted, sentenced, and as such they are not considered “post-trial” prisoners under these guidelines (R. 84-91). At Camp 5 eight Commission detainees are held at first floor, charlie wing (R. 91-92). One, whose case is at the Supreme Court, is under a court order. The other is at Camp 1 for operational reasons (R. 92). The Commission detainees are in Camp 5 for security and safety (R. 94, 106). There is a risk of escape, and harm to themselves or others for detainees pending trial by Commission (R. 97). The Accused was charged in November 2005, but did not attempt to escape or to harm anyone (R. 98). The Accused did not have any behavioral problems (R. 104). He was not aware of any threats to harm the Accused (R. 101-102).	<u>81-106</u>
It is generally known that persons undergoing trial sometimes become despondent, and may turn to self-injury (R. 107). Between November 2005 (when he was charged) and the hearing, the Accused did not injure or attempt to injure himself (R. 110-111).	<u>107-111</u>

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Prosecution cross-examination of Colonel B	<u>112-134</u>
A month ago the Defense counsel raised the issue with COL B about the Accused having a problem washing himself because of his hand injury (R. 115). The next morning, the sink was modified so the faucet-button could be pushed and the water would run longer (R. 115-116). Prior to hearing from the Defense attorney, the Accused did not complain to the guards (R. 116).	<u>115-116</u>
At Camp 5 recreation times are rotated from tier to tier (R. 119). Recreation time is 0500-2200 (R. 120). One to three times a week, a Camp 5, Commission detainee will receive daylight recreation time (R. 121). They exercise in adjacent recreation areas and are able to see other detainees (R. 122). Recreation areas are 5 yards by 10 yards (R. 122). They are not able to touch each other during recreation because there are “pens” between the recreation areas (R. 123).	<u>119-123</u>
Meetings with Defense Counsel are in Camp Echo because there is better privacy and security (R. 123). There are cameras in the Camp Echo cells—they monitor visually, but there is no audio (R. 123-124). Commission detainees have full access to their legal matters (R. 124). They can keep legal matters in their locker, at the end of the tier. These matters may be brought to, and retained by the detainee between 2200 and 0500 (R. 125). At Camp 4, the detainee’s legal matters are kept under a detainee’s bed, and as such are less secure (R. 126). One detainee’s legal matters are so voluminous that they are kept in a reading room (R. 127). The transfer of Commission detainees was not designed to adversely affect the attorney-client relationship (R. 128).	<u>123-128</u>
At Camp 4 the meals are like a family picnic. The detainees eat collectively in a buffet style (R. 132).	<u>133</u>

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Defense re-direct examination of Colonel B	<u>134-153</u>
Defense Counsel wanted to ask COL B about why a Commission detainee remained at Camp 1, but the Presiding Officer did not require an answer, apparently it would have been a classified operational answer (R. 135-136). The Presiding Officer said the previous answer was adequate (R. 136). COL B visited Camp 5, three to four times a week and mainly relied on reports from subordinates as his basis of knowledge about Camp 5's conditions.	<u>135-139</u>
COL B did not consider the impact on the attorney-client relationship of the Accused's move from Camp 4 to Camp 5 (R. 142-143), nor did he consider informing Defense Counsel before the move (R. 144). He moved Commission detainees based on safety and security considerations (R. 143). The Accused was not told why he was being moved (R. 145), nor was he told why the other two Commission detainees were not moved to Camp 5 (R. 147). COL B asked to move Khadr [another Accused pending Commission trial] from Camp 4 to Camp 5, but was not permitted to do so by Major General Hood (R. 149-150). It was a "point of contention" between COL B and Major General Hood (R. 150).	<u>142-153</u>
Defense direct examination of the Accused	<u>156-163</u>
The Accused testified that he has been at Guantanamo almost four years (R. 157). He lived at Camp 4 about a year, and was moved to Camp 5 one month ago (R. 157). He did not cause any problems at Camp 4, did not make threats, did not try to hurt himself, and did not attempt to escape (R. 158). He thought the move to Camp 5 was for punishment (R. 159). There was more freedom at Camp 4, and it was more difficult to use the toilet at Camp 5 because of the Accused's damaged hand (R. 160-161). The cold air conditioning at Camp 5 also hurt	

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his injured hand (R. 161). The faucets at Camp 4 are easier to use, and there are friends at Camp 4 who can help (R. 162-163). The move affected his trust for his attorney because it was unexpected (R. 163).	<u>156-163</u>
Prosecution cross-examination of the Accused	<u>164-183</u>
The Accused had many conversations with his Defense Counsel (R. 164-165). He cooperated with his Defense Counsel from the start (R. 165). The Camp staff was not responsive and did not resolve even small issues that the Accused requested (R. 167). The Accused asked why he was moved to Camp 5, but there was no answer (R. 168). The air conditioning at Camp 5 is loud and it is difficult to talk to other detainees in adjoining cells (R. 169). The Accused enjoyed the sunlight and was outside more at Camp 4 (R. 170). At Camp 5 most of the time he is taken outside at night (R. 171). The Accused does not exercise (R. 171). The Accused's left hand has nerve and bone damage and is always cold (R. 172). Being in the sun, and hand cream helps with the pain and sensitivity (R. 173). There is poor circulation in his hand (R. 174). He needs to put his hand out into the sun light (R. 175). The Accused asked for a heavier, warmer glove, but did not receive one (R. 176). Both the toilet and sink at Camp 5 are harder for the Accused to use (R. 176-177). They did come to fix the sink, but it is still the same sink and toilet (R. 177).	<u>164-177</u>
The Accused thought he was moved for cooperating with the Commission (R. 178). Even after hearing COL B's testimony the Accused still thought he was being punished by the move to Camp 5 (R. 178).	<u>178</u>
The Accused told the Combatant Status Review Tribunal in 2003 or 2004 that his hand was blown off by a landmine in Afghanistan (R. 180). What he told the CSRT was the truth (R. 181-183).	<u>180-183</u>

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Defense re-direct of the Accused	<u>184-187</u>
The Accused had many conversations with his Defense Counsel over two days about being moved from Camp 4 to Camp 5 (R. 184). The Accused considered boycotting the proceedings because of the move to Camp 5 (R. 185-186). He decided to cooperate with his Defense Counsel because of this motion.	<u>184-187</u>
Defense Counsel argued that COL B failed to explain why the Accused had to move to Camp 5, except that he was pending trial by Commission (R. 193). He urged complete application of Geneva Convention III, especially the courts-martial rules (R. 194). Article 103 applies courts-martial rules to pretrial confinement. The Accused would not be in pretrial confinement under court-martial rules because: (1) he was not a flight risk, (2) he would not engage in foreseeable misconduct, and (3) lesser forms of restraint were not determined to be inadequate (R. 195). There was no individualized evaluation of each Commission detainee's case, instead 8 Commission detainees were placed into Camp 5 without regard for their individual situations (R. 196-198). The Accused believed confinement in Camp 5 was punishment (R. 199). The Defense wanted the Commission abated until the Accused was moved back to Camp 4 (R. 200).	<u>193-200</u>
The Prosecution urged the Presiding Officer to deny the Defense motion, arguing that COL B provided a rational basis for moving the Accused to Camp 5, that is, security and safety. Someone who is pending trial is a greater security risk.	<u>200-204</u>
Defense Counsel argued on rebuttal that the move hurt the attorney-client relationship because the issue wastes time and will continue to waste time (R. 204-205). The Defense Counsel repeated his assertion that the decision to place the Accused into Camp 5 must be based on the facts and circumstances of the Accused's situation. The Accused was moved to Camp 5 solely because of his pending Commission trial.	<u>204-206</u>

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The Presiding Officer denied the Defense motion and found:	
(1) the move to Camp 5 was part of a camp-wide reorganization	
(2) the move of the Commission detainees to Camp 5 was viewed by COL B as consistent with Army Regulations and the Geneva Conventions. The rules in these documents are the best available guidance in structuring the detention camps.	
(3) safety, order and security during the trial process are enhanced at Camp 5—ensuring security and order are permissible non-punitive governmental objectives	
(4) there was no intent to punish the Accused	
(5) access to counsel is equivalent at Camps 4 and 5	
(6) courts normally defer to confinement officials' security decisions	<u>209-217</u>
The hearing was recessed on 26 April 2006	<u>217</u>
Authentication for R. 20-218	<u>218</u>

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The commissions hearing was called to order at 1458, on 2 March 2006.

Presiding Officer: This military commission is called to order.

Would the prosecutor please state the jurisdictional basis for this military commission.

PROS: This military commission is appointed by Appointing Order 05-0007, dated December 16-th, 2005, as amended by Appointing Order 06-0005, dated February 1 2006; copies of which have been furnished to the Presiding Officer, counsel, and the accused, and which have been marked -- excuse me -- as Review Exhibits 5 and 30, respectively.

The Presidential determination that the accused may be subject to trial by military commission has been marked as RE-1 and has been previously shown to the defense.

1
2 The charges have been marked as RE-2 and have been
3 properly approved by the Appointing Authority and
4 referred to this commission for trial. The
5 approval of the charges and their referral to this
6 commission have been marked as RE 3 and 4,
7 respectively.

8
9 The prosecution caused a copy of the charges in
10 English and Arabic, the accused's native language,
11 to be served on the accused on November 30th, 2005.

12
13 The prosecution is ready to proceed in the
14 commission trial of the *United States v. Sufyian*
15 *Barhoumi*.

16
17 The accused, the Presiding Officer, and all
18 detailed counsel are present.

19
20 The court reporter has been detailed reporter for
21 this commission and has been previously sworn.
22

1 Security personnel that have been detailed for this
2 commission have been previously sworn.
3

4 Presiding Officer: Thank you. I have been designated as the
5 Presiding Officer of this military commission by
6 the Appointing Authority, and I have been
7 previously sworn.
8

9 Before continuing with the preliminary matters,
10 it's necessary for me to inquire into the accused's
11 need for an interpreter-translator.
12

13 Mr. Barhoumi, are you able to speak and understand
14 English?
15

16 ACC: I do not need a translator -- I do need a
17 translator.
18

19 Presiding Officer: Well, is there a translator with you now
20 in the courtroom that speaks the language that you
21 also speak?
22

1 ACC: Yes. He is sitting next to me.

2

3 Presiding Officer: Very well. Sir, will you please tell me
4 if you are the defendant's translator.

5

6 Translator: Yes, I am, sir.

7

8 Presiding Officer: And do you object to your stating your
9 name in court?

10

11 Translator: I would rather not to, sir.

12

13 Presiding Officer: Very well. Would you please write your
14 name on a piece of paper?

15

16 *The translator did as directed.*

17

18 Presiding Officer: Very well. Bailiff, will you please
19 convey that to the court reporter for insertion
20 into the court as the next review exhibit.

21

22 *The bailiff did as directed.*

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Presiding Officer: And, sir, are you qualified to interpret
and to translate into the accused's native
language?

Translator: Yes, I do, sir.

Presiding Officer: And have you been previously sworn?

Translator: No, I haven't, sir.

Presiding Officer: Very well. Will the prosecution please
swear in the translator.

The translator was sworn.

Presiding Officer: Will the prosecutor please state by whom
you have been detailed and your legal
qualifications.

PROS: All members of the prosecution have been detailed
to this military commission by the Chief

1 Prosecutor. All members of the prosecution are
2 qualified under Military Commission Order 1,
3 Paragraph 4(b), and we have been previously sworn.
4 No member of the prosecution has acted in any
5 manner which might tend to disqualify us in this
6 proceeding.

7
8 The detailing document has been marked as RE-11.

9
10 The prosecution also has sitting at prosecution
11 table an assistant who will assist the prosecution
12 but will not be representing the government.

13
14 Presiding Officer: Thank you. Will the military defense
15 counsel please state by whom you have been detailed
16 and your legal qualifications.

17
18 DC: Yes, sir. I have been detailed to this military
19 commission by the Chief Defense Counsel. I am
20 qualified under Military Commission Order 1,
21 Paragraph 4(c), and I have previously been sworn.
22 I have not acted in any manner, which might tend to

1 disqualify me in this proceeding.

2
3 The document detailing counsel has been marked as
4 Review Exhibit 6.

5
6 Presiding Officer: Thank you. Mr. Barhoumi, pursuant to
7 Military Commission Order 1, Captain Faulkner, who
8 is a military lawyer, has been assigned to
9 represent you as your detailed defense counsel.
10 Detailed defense counsel are provided to you at no
11 expense.

12
13 You may also request a different military lawyer to
14 represent you; and if the military lawyer you
15 request is reasonably available, that lawyer would
16 be appointed to represent you free of charge.

17
18 In addition, you may be represented by a qualified
19 civilian lawyer. However, a civilian lawyer would
20 represent you at no expense to the United States.

21
22 A civilian lawyer whom you wish to represent you

1 must be a U.S. citizen; admitted to the practice of
2 law in a state, district, territory, or possession
3 of the United States or a federal court; may not
4 have been sanctioned or disciplined for any
5 relevant misconduct; be eligible for a secret
6 clearance; and agree in writing to comply with the
7 orders, rules, and regulations of these military
8 commissions. If a civilian lawyer represents you,
9 your detailed defense counsel will also continue to
10 represent you, and your detailed defense counsel
11 will be present during the presentation of all of
12 the evidence.

13
14 Do you understand what I've just told you with
15 respect to your rights to counsel?
16

17 ACC: Yes, I do.
18

19 Presiding Officer: Thank you. Do you have any questions
20 about your rights to counsel before this
21 commission?
22

1 ACC: I do not have any questions.

2

3 Presiding Officer: Thank you. Do you desire to be
4 represented by Captain Faulkner, who is your
5 detailed defense counsel?

6

7 ACC: I currently need more time, so I am able to trust
8 him. I've only known him for a short period of
9 time. I will need further time.

10

11 Presiding Officer: I understand. Do you desire to be
12 represented by any other counsel?

13

14 ACC: Which attorney do you mean?

15

16 Presiding Officer: Well, it would be up to you to select or
17 request another military counsel or a civilian
18 counsel who is qualified.

19

20 ACC: I request a civilian attorney.

21

22 Presiding Officer: Very well. I understand that you wish to

1 have a civilian attorney by the name of Lee Foreman
2 represent you before this commission. Is that
3 correct?

4
5 ACC: Yes.

6
7 Presiding Officer: Have you had the opportunity to speak
8 with Mr. Foreman?

9
10 ACC: I did not understand the question.

11
12 Presiding Officer: The civilian attorney, Mr. Lee Foreman
13 whom you just indicated that you would like to
14 represent you, have you met Mr. Foreman?

15
16 ACC: No, I have not spoken with him at all.

17
18 Presiding Officer: Have you corresponded with him in
19 writing?

20
21 ACC: No, I have not.

1 Presiding Officer: Mr. Barhoumi, I believe you know that
2 this session was originally scheduled more than a
3 month ago to address a number of issues; but in
4 deference to you, I've delayed consideration of all
5 those other issues until the next session of the
6 commission and I've limited your time in this
7 commission room today to only the matters of
8 discussing your counsel. I've advised you of your
9 rights to counsel, and I'll simply conclude by
10 telling you that Captain Faulkner is your detailed
11 defense counsel.

12
13 I will not require you to elect additional counsel
14 today. However, I will tell you that you must work
15 with your detailed defense counsel to obtain other
16 qualified counsel, including Mr. Foreman, whom you
17 desire to represent you and to have that counsel
18 present at the next session of this commission, which
19 is presently scheduled to begin on April the 3rd.

20
21 Do you understand what I've just described for you?
22

1 ACC: Yes.

2

3 Presiding Officer: Thank you. Captain Faulkner, I want to
4 ensure that you understand that you and any other
5 qualified counsel are to be prepared for the next
6 session of this commission and be present at that
7 session prepared to address the issues that were
8 originally scheduled for today, which were delayed
9 in response to your request on behalf of
10 Mr. Barhoumi. These would include voir dire for
11 the Presiding Officer, issuing any challenge
12 against the Presiding Officer, addressing
13 protective orders, addressing the motion to abate
14 which you've filed, raising objections to
15 discovery, and otherwise complying with the
16 discovery and other orders of this commission.

17

18 Do you have any questions?

19

20 DC: No, sir.

21

22 Presiding Officer: Thank you. I'd also -- perhaps it goes

1 without saying -- I do want to at least place it on
2 the record that -- and I'm sure that you understand
3 this -- that it's your responsibility to help
4 Mr. Barhoumi to obtain counsel of his choosing.
5 He's indicated that he would like to have a
6 civilian counsel and specifically Mr. Foreman. I
7 don't know that Mr. Foreman is yet on the approved
8 list, so I view it as your responsibility to assist
9 Mr. Foreman in maintaining or achieving
10 qualifications, facilitate Mr. Barhoumi's
11 communications with Mr. Foreman in order to
12 determine whether he is able and willing to
13 represent him before the commissions. And, in
14 addition, should Mr. Barhoumi choose to exercise
15 his right to have additional military counsel,
16 assist him in obtaining that counsel as well.

17
18 Is that your understanding?

19
20 DC: Yes, sir.

21
22 Presiding Officer: And you're able to do that?

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DC: I am, sir.

Presiding Officer: Mr. Barhoumi, do you understand that
Captain Faulkner will help you to retain the
services of Mr. Foreman and additional military
counsel if you choose to have one or both of those
lawyers join your defense team?

ACC: Yes, I understand.

Presiding Officer: Do you have any questions?

ACC: No, I don't. Thank you.

Presiding Officer: Captain Faulkner, do you have any
questions about how we are to proceed here?

DC: I do not, sir.

Presiding Officer: Very well. Does the prosecution have
anything else to accomplish today?

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PROS: The prosecution does not, sir.

Presiding Officer: Captain Faulkner, anything further?

DC: Sir, if we could address two brief subjects.

Presiding Officer: Yes.

DC: I talked briefly with the prosecution this morning, and it is their understanding that Protective Order 3, which is at RE-17, would prohibit the defense team from disclosing FOUO or law enforcement sensitive materials to the accused. They indicated to me in this brief conversation that they believe, as do I, that I should be able to share those materials with the accused. And if there's no objection from the prosecution, if you could order that that -- that that is okay for me to share those materials with Mr. Barhoumi, I would appreciate it.

1 Presiding Officer: Well, what I would ask you to do, if both
2 sides are in agreement to that, then submit
3 something to me with your concurrences and I will
4 consider that.

5
6 DC: Will do, sir.

7
8 One other issue, as you are aware, Mr. Barhoumi was
9 informed late Tuesday that his father had passed
10 away.

11
12 Presiding Officer: Yes.

13
14 DC: And the defense would like to know if there is
15 anyway that you can allow for him to make a brief
16 phone call to his family in Algeria with the --
17 I've already checked and the phone line that is
18 adjacent to the room where they keep Mr. Barhoumi
19 in the commission house does have a line available,
20 and that line is able to call Algeria, and there
21 could be a government representative and translator
22 present to make sure that nothing untoward was

1 passed over the phone lines or anything like that.
2 He just wanted to check on the status and get some
3 more details on his father, sir.

4
5 Presiding Officer: I understand. It was precisely for that
6 reason that I deferred all of the issues that we
7 were to cover today in deference to Mr. Barhoumi's
8 personal situation.

9
10 Have you approached the chain of command that is in
11 charge of security and the like to facilitate this
12 phone call?

13
14 DC: I have not as of yet, sir.

15
16 Presiding Officer: Let me send you to those who are in
17 charge of the phones and make other security
18 arrangements and approach them to do that.

19
20 If you are not able -- well, let me just send you
21 to them and see what the answer is. I don't know
22 whether that's something they can do or not. I

1 simply don't have any information before me.

2
3 So let me ask you to go and see those people; and
4 then if you're not satisfied, go to the prosecution
5 and see if there is something else that needs to be
6 raised to my attention.

7
8 DC: Okay. We'll do that, sir. Thank you.

9
10 Presiding Officer: Very well. Anything else?

11
12 DC: No, sir.

13
14 PROS: No, sir.

15
16 Presiding Officer: This commission is in recess.

17
18 *The commissions hearing recessed at 1514, 2 March 2006.*

**AUTHENTICATION OF
FINAL SESSION TRANSCRIPT**

in the case of:

United States v. Sufyian Barhoumi

a/k/a/ Abu Obaida

a/k/a Ubaydah al Jaza'iri

a/k/a Shafiq

This is to certify that the Pages 1 through 19 are an accurate and verbatim transcript of the proceedings held in the above styled case on March 2, 2006.



DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

20 March 2006
DATE

1 The Commissions Hearing was called to order at 0903, 26
2 April 2006.

3

4 [Throughout this transcript, Captain Daniel O'Toole, U.S.
5 Navy, will be referred to as the Presiding Officer or PO.
6 Captain [REDACTED] U.S. Air Force, will be referred to
7 as the Prosecutor or PROS. Lieutenant [REDACTED]
8 Jr., U.S. Navy Reserve, will be referred to as Assistant
9 Prosecutor or APROS. Captain Wade Faulkner, U.S. Army,
10 will be referred to as Defense Counsel or DC.]

11

12 **PRESIDING OFFICER:** The Military Commission is called to
13 order. Before continuing, let me note that the
14 accused is seated at the defense table. He is
15 not wearing his headphones, however, I note that
16 the defense translator is wearing headphones.

17

18 Sir, is the broadcast coming through? I note
19 that the accused is now wearing his headphones.

20

21 Mr. Barhoumi, are you able to hear and understand
22 the translation?

23

1 **ACC:** Currently, it is good.

2

3 **Presiding Officer:** Thank you. Captain Faulkner, I note
4 that at our last session Mr. Barhoumi asked to be
5 represented by Mr. Foreman and Mr. Foreman is not
6 present today. Can you inform me as to Mr.
7 Foreman's status?

8

9 **DC:** Yes, sir. He submitted an application to the
10 Chief Defense Counsel shortly after the last
11 session. As recently as, I believe it was
12 Wednesday of last week, he still had not been
13 granted an interim security clearance and was
14 therefore unable to accompany me on this trip.

15

16 **Presiding Officer:** Well, given his absence today, what is
17 the defense position with respect to the matters
18 that were scheduled for disposition today?

19

20 **DC:** Sir, the defense would request that we defer voir
21 dire, and the motion to abate the proceedings, as
22 well as the motion for modification of the
23 discovery order, and that the defense be allowed

1 to proceed with the motion concerning the movement
2 of Mr. Barhoumi from Camp Four to Camp Five.

3
4 **Presiding Officer:** Thank you. Mr. Barhoumi, at our last
5 session, I advised you of your right to be
6 represented before this Commission by qualified
7 counsel. Let me review those rights with you
8 now.

9
10 Pursuant to Military Commission Order Number 1,
11 Captain Faulkner, who is a military lawyer, has
12 been assigned to represent you as your detailed
13 defense counsel. You may also request a
14 different military lawyer to represent you. If
15 the military lawyer you request is reasonably
16 available, that lawyer would also be appointed to
17 represent you. Detailed defense counsel are
18 provided to you at no cost to you.

19
20 In addition, you may be represented by a civilian
21 counsel, however, a civilian lawyer would
22 represent you at no expense to the United States
23 and he would have to be qualified.

1

2 At our last session I understood your request to
3 be represented by Mr. Lee Foreman. I also
4 understand that Mr. Foreman has agreed to
5 represent you, that he has applied for a secret
6 clearance in order to be qualified to represent
7 you.

8

9 Your detailed defense counsel has advised that
10 Mr. Foreman's security clearance is being
11 processed but was not approved in time for him to
12 be here today. Is this also your understanding?

13

14 **ACC:** Yes.

15

16 **Presiding Officer:** Thank you. Do you understand that if
17 Mr. Foreman represents you once his clearance is
18 granted, that your detailed defense counsel will
19 also continue to represent you and your detailed
20 defense counsel will be present during the
21 presentation of all the evidence. Do you
22 understand what I have just told you?

23

1 **ACC:** Yes.

2

3 **Presiding Officer:** Thank you. Do you have any questions
4 about your rights to counsel before this
5 Commission?

6

7 **ACC:** Currently, I don't have.

8

9 **Presiding Officer:** Do you still wish to be represented by
10 Mr. Foreman?

11

12 **ACC:** Yes.

13

14 **Presiding Officer:** At our last session, you told me that
15 you would like more time to work with Captain
16 Faulkner before you accept him as your detailed
17 defense counsel. Since our last session, have
18 you had the opportunity to speak with Captain
19 Faulkner about matters that are important to you
20 regarding these proceedings?

21

22 **ACC:** I had some time but it was a little time.

23

1 **Presiding Officer:** Do you also wish to be represented by
2 Captain Faulkner as your detailed defense
3 counsel?
4
5 **ACC:** To me it is all good.
6
7 **Presiding Officer:** Do I understand that you would like
8 Captain Faulkner to be your detailed defense
9 counsel?
10
11 **ACC:** Yes.
12
13 **Presiding Officer:** Do you wish to be represented by any
14 other counsel other than Mr. Foreman and Captain
15 Faulkner?
16
17 **ACC:** I spoke with him and I know the procedure. He
18 knows what I want.
19
20 **Presiding Officer:** Captain Faulkner, in view of your
21 client's desire to be represented by you and Mr.
22 Foreman, are you ready to proceed with the
23 reading of the charges this morning?

1

2 **DC:** Yes, sir.

3

4 **Presiding Officer:** Very well.

5

6 **APROS:** Jurisdiction for this Military Commission is
7 based on the President's determination of July
8 6th, 2004 that Sufyian Barhoumi (a/k/a/ Abu
9 Obaida a/k/a/ Ubaydah Al Jaza'iri a/k/a/ Shafiq
10 hereinafter "Barhoumi") is subject to his
11 Military Order of November 13, 2001.

12

13 The charged conduct alleged against Barhoumi is
14 triable by a military commission.

15

16 General Allegations: Al Qaida ("the Base"), was
17 founded by Usama bin Laden and others in or about
18 1989 for the purpose of opposing certain
19 governments and officials with force and
20 violence.

21

22 Usama bin Laden is recognized as the emir (prince
23 or leader) of al Qaida.

1

2 A purpose or goal of al Qaida, as stated by Usama
3 bin Laden and other al Qaida leaders, is to
4 support violent attacks against the property and
5 nationals (both military and civilian) of the
6 United States and other countries for the purpose
7 of, inter alia, forcing the United States to
8 withdraw its forces from the Arabian Peninsula
9 and in retaliation for U.S. support of Israel.

10

11 Al Qaida operations and activities are directed
12 by a shura (consultation) council composed of
13 committees, including: political committee;
14 military committee; security committee; finance
15 committee; media committee; and religious/legal
16 committee.

17

18 Between 1989 and 2001, al Qaida established
19 training camps, guest houses, and business
20 operations in Afghanistan, Pakistan, and other
21 countries for the purpose of training and
22 supporting violent attacks against property and

1 nationals (both military and civilian) of the
2 United States and other countries.

3
4 In 1992 and 1993, al Qaida supported violent
5 opposition of U.S. property and nationals by,
6 among other things, transporting personnel,
7 weapons, explosives, and ammunition to Yemen,
8 Saudi Arabia, Somalia, and other countries.

9
10 In August 1996, Usama bin Laden issued a public
11 "Declaration of Jihad Against the Americans," in
12 which he called for the murder of U.S. military
13 personnel serving on the Arabian peninsula.

14
15 In February 1998, Usama bin Laden, Ayman al
16 Zawahiri, and others, under the banner of
17 "International Islamic Front for Fighting Jews
18 and Crusaders," issued a fatwa (purported
19 religious ruling) requiring all Muslims able to
20 do so to kill Americans, whether civilian or
21 military, anywhere they can be found and to
22 "plunder their money."

1 On or about May 29, 1998, Usama bin Laden issued
2 a statement entitled "The Nuclear Bomb of Islam,"
3 under the banner of the "International Islamic
4 Front for Fighting Jews and Crusaders," in which
5 he stated that "it is the duty of Muslims to
6 prepare as much force as possible to terrorize
7 the enemies of God."

8
9 Since 1989 members and associates of al Qaida,
10 known and unknown, have carried out numerous
11 terrorist attacks, including, but not limited to:
12 the attacks against the American Embassies in
13 Kenya and Tanzania in August 1998; the attack
14 against the U.S.S. COLE in October 2000; and the
15 attacks on the United States on September 11,
16 2001.

17
18 Charge: Conspiracy: Sufyian Barhoumi, Jabran
19 Said bin al Qahtani, and Ghassan al Sharbi, in
20 the United States, Afghanistan, Pakistan, and
21 other countries, from on or about January 1996 to
22 on or about March 2002, willfully and knowingly
23 joined an enterprise of persons who shared a

1 common criminal purpose and conspired and agreed
2 with Usama bin Laden (a/k/a Abu Abdullah), Saif
3 al Adel, Dr. Ayman al Zawahiri (a/k/a "the
4 Doctor"), Muhammad Atef (a/k/a Abu Hafs al
5 Masri), Zayn al Abidin Muhammad Husayn (a/k/a/
6 Abu Zubayda, hereinafter "Abu Zubayda"), Binyam
7 Muhammad, Noor al Deen, Akrama al Sudani and
8 other members and associates of the al Qaida
9 organization, known and unknown, to commit the
10 following offenses triable by military
11 commission: attacking civilians; attacking
12 civilian objects; murder by an unprivileged
13 belligerent; destruction of property by an
14 unprivileged belligerent; and terrorism.

15
16 In furtherance of this enterprise and conspiracy,
17 al Sharbi, Barhoumi, al Qahtani, Abu Zubayda,
18 Binyam Muhammad, Noor al Deen, Akrama al Sudani,
19 and other members or associates of al Qaida
20 committed the following overt acts:

21
22 In 1998 Barhoumi, an Algerian citizen, attended
23 the electronics and explosives course at Khalden

1 Camp in Afghanistan, an al Qaida-affiliated
2 training camp, where he received training in
3 constructing and dismantling electronically-
4 controlled explosives.

5
6 After completing his training, Barhoumi became an
7 explosives trainer for al Qaida, training members
8 of al Qaida on electronically-controlled
9 explosives at remote locations.

10
11 **Presiding Officer:** Lieutenant, let me interrupt and ask
12 you to slow down just a bit for the translator.

13
14 **APROS:** Yes, sir.

15
16 **Presiding Officer:** Thank you.

17
18 **APROS:** In or about August 2000, al Sharbi, a Saudi
19 citizen and Electrical engineering graduate of
20 Embry Riddle University, in Prescott, Arizona,
21 departed the United States in search of terrorist
22 training in Afghanistan.

23

1

2 In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al
3 Masri), the head of al Qaida's military committee
4 and al Qaida's military commander, wrote a letter
5 to Abu Muhammad, the emir of al Qaida's al Farouq
6 Camp, asking him to select two "brothers" from
7 the camp to receive electronically-controlled
8 explosives training in Pakistan, for the purpose
9 of establishing a new and independent section of
10 the military committee.

11

12 In July 2001, al Sharbi attended the al Qaida-run
13 al Farouq training camp, where he was first
14 introduced to Usama bin Laden. At al Farouq, al
15 Sharbi's training included, inter alia, physical
16 training, military tactics, weapons instruction,
17 and firing on a variety of individual and crew-
18 served weapons.

19

20 During July and August 2001, al Sharbi stood
21 watch with loaded weapons at al Farouq at times
22 when Usama bin Laden visited the camp.

23

1 From July 2001 to September 13, 2001, al Sharbi
2 provided English translation for another camp
3 attendee's military training at al Farouq, to
4 include translating the attendee's personal bayat
5 ("oath of allegiance") to Usama bin Laden.

6
7 On or about September 13, 2001, anticipating a
8 military response to al Qaida's attacks on the
9 United States of September 11th, 2001, al Sharbi
10 and the remaining trainees were ordered to
11 evacuate al Farouq. Al Sharbi and others fled
12 the camp and were told to fire warning shots in
13 the air if they saw American missiles
14 approaching.

15
16 Shortly after the September 11 2001 attacks on
17 the United States, al Qahtani, a Saudi citizen
18 and Electrical engineering graduate of King Saud
19 University in Saudi Arabia, left Saudi Arabia
20 with the intent to fight against the Northern
21 Alliance and American Forces, whom he expected
22 would soon be fighting in Afghanistan.

1

2 In October 2001, al Qahtani attended a newly
3 established terrorist training camp North of
4 Kabul, where he received physical conditioning,
5 and training in the PK Machine gun and AK-47
6 assault rifle.

7

8 Between late December 2001 and the end of
9 February 2002, Abu Zubayda, a high-ranking al
10 Qaida recruiter and operational planner, assisted
11 in moving al Sharbi, al Qahtani and Binyam
12 Muhammad from Birmel, Afghanistan to a guest
13 house in Faisalabad, Pakistan where they would
14 obtain further training.

15

16 By early March 2002, Abu Zubayda, Barhoumi, al
17 Sharbi, al Qahtani, and Binyam Muhammad had all
18 arrived at the guesthouse in Faisalabad,
19 Pakistan. Barhoumi was to train al Sharbi, al
20 Qahtani and Binyam Muhammad in building small,
21 hand-held remote-detonation devices for
22 explosives that would later be used in
23 Afghanistan against United States forces.

1

2 In March 2002, after Barhoumi, al Sharbi and al
3 Qahtani had all arrived at the guesthouse, Abu
4 Zubayda provided approximately \$1,000 U.S.
5 Dollars for the purchase of components to be used
6 for training al Sharbi and al Qahtani in making
7 remote-detonation devices.

8

9 Shortly after receiving the money for the
10 components, Barhoumi, Noor al Deen and other
11 individuals staying at the house went into
12 downtown Faisalabad with a five page list of
13 electrical equipment and devices for purchase
14 which included, inter alia, electrical resistors,
15 plastic resistors, light bulbs for circuit board
16 lights, plastic and ceramic diodes, circuit
17 testing boards, an ohmmeter, watches, soldering
18 wire, soldering guns, wire and coil, six cell
19 phones of a specified model, transformers and an
20 electronics manual.

21

22 After purchasing the necessary components, al
23 Qahtani and al Sharbi received training from

1 Barhoumi on how to build hand-held remote-
2 detonation devices for explosives while at the
3 guest house.

4
5 During March 2002, after his initial training, al
6 Qahtani was given the mission of constructing as
7 many circuit boards as possible with the intent
8 to ship them to Afghanistan to be used as timing
9 devices in bombs.

10
11 After their training was completed and a
12 sufficient number of circuit boards were built,
13 Abu Zubayda had directed that al Qahtani and al
14 Sharbi were to return to Afghanistan in order to
15 use, and to train others to construct remote-
16 control devices to detonate car bombs against
17 United States forces.

18
19 During March 2002 al Qahtani wrote two
20 instructional manuals on assembling circuit
21 boards that could be used as timing devices for
22 bombs and other improvised explosive devices.

1 On March 28, 2002, Barhoumi, al Sharbi, al
2 Qahtani, Abu Zubayda and others were captured in
3 a safe house in Faisalabad after authorities
4 raided the home.

5

6 **Presiding Officer:** Thank you.

7

8 **APROS:** Yes, sir.

9

10 **Presiding Officer:** Lieutenant, correct me if I am wrong,
11 but I don't believe when we opened this morning
12 we announced whether all the parties were
13 present.

14

15 **APROS:** We didn't, and all parties that were previously
16 present when the Commission recessed are again
17 present, sir.

18

19 **Presiding Officer:** Thank you. Captain Faulkner, in view
20 of your client's specific request to be
21 represented by Mr. Foreman, both at our last
22 session and this morning, and in view of Mr.
23 Foreman's substantial steps towards

1 representation, I am confident that he will, in
2 fact, join the defense team, so I will allow you
3 to defer at your request, the voir dire and
4 challenges of the Presiding Officer.
5
6 I would, however, like to cover protective
7 orders. Do counsel for both sides understand the
8 provisions of Military Commission Order Number 1,
9 which governs protected information?
10
11 **APROS:** The government does, sir.
12
13 **DC:** Yes, sir.
14
15 **Presiding Officer:** And do you understand that you must, as
16 soon as practicable, notify me of any intent to
17 offer evidence involving protected information so
18 that I may consider the need to close the
19 proceedings?
20
21 **APROS:** Yes, sir.
22
23 **DC:** Yes, sir.

1

2 **Presiding Officer:** Thank you. Is there any issue related
3 to the protection of witnesses that should be
4 taken up at this time, as may be necessary, to
5 discuss and litigate motions or conduct other
6 business before the Commission today?

7

8 **APROS:** Yes, sir. I believe that the Colonel that is
9 about to testify in one of the motions, his last
10 name will not be revealed in open court and his
11 first initial of his last name will be used
12 instead.

13

14 **Presiding Officer:** Very well. Is the defense aware of
15 that?

16

17 **DC:** Yes, sir.

18

19 **Presiding Officer:** Any objection to that?

20

21 **DC:** No, sir.

22

1 **Presiding Officer:** Any other matters with respect to the
2 protection of witnesses?

3

4 **APROS:** Not from the government, sir.

5

6 **DC:** No, sir.

7

8 **Presiding Officer:** As I am required by Military Commission
9 Order Number 1 to consider the safety of
10 witnesses and others at these proceedings, do
11 counsel understand that they must notify me of
12 any issue regarding the safety of potential
13 witnesses so that I may determine the appropriate
14 way in which testimony will be received and
15 witnesses protected?

16

17 **APROS:** Yes, sir.

18

19 **DC:** Yes, sir.

20

21 **Presiding Officer:** Thank you. Now the only protective
22 orders of which I am aware are Protective Orders
23 1, 2, and 3(a), which have been marked RE 15, 16,

1 and 46. Now have both sides seen these
2 protective orders?
3
4 **APROS:** The prosecution has, sir.
5
6 **DC:** Yes, sir.
7
8 **Presiding Officer:** Are counsel aware of any other
9 protective orders other than those three?
10
11 **APROS:** The prosecution is aware of none, sir.
12
13 **DC:** No, sir.
14
15 **Presiding Officer:** Thank you. All current presiding
16 officer memoranda, as listed on the review
17 exhibits and any other subsequent modifications
18 of them are in effect as rules of court for this
19 Commission and that would be RE 27.
20
21 The current filings inventory has been marked RE
22 45. Do counsel for both sides agree that that is

1 an accurate reflection of the filings, the
2 motions, responses, and replies filed to date?

3

4 **APROS:** Yes, sir.

5

6 **DC:** Yes, sir.

7

8 **Presiding Officer:** Thank you. At this time, well let me
9 approach it this way. Captain Faulkner, you
10 filed several motions; a motion to abate
11 proceedings, at RE 19; a motion opposing the
12 discovery order, at RE 37; a motion for relief
13 from the accused's transfer to Camp 5, at RE 38.
14 Does the defense have any additional matters that
15 constitute motions or any other motions you care
16 to make today?

17

18 **DC:** No, sir.

19

20 **Presiding Officer:** And once again, at your request, I will
21 allow you to defer consideration of those
22 motions, if you'd like to; but I believe you told
23 me you would like to proceed with the motion for

1 relief from the accused's transfer. Is that
2 right?
3
4 **DC:** That's correct, sir.
5
6 **Presiding Officer:** Very well. I'll allow you to proceed
7 with that. You may proceed.
8
9 **DC:** Sir, the defense calls Colonel B.
10
11 **Presiding Officer:** Very well. Where is the witness
12 located?
13
14 **APROS:** He's upstairs, sir. My understanding is the
15 bailiff will make arrangements to bring the
16 Colonel in.
17
18 **Presiding Officer:** Do we need to take a brief recess to do
19 that?
20
21 **APROS:** I don't believe so, sir.
22

1 **Presiding Officer:** Very well. We'll just stand in place.

2 Thank you.

3

4 **COLONEL M.B, U.S. Army, was called as a witness for the**

5 **defense, was sworn, and testified as follows:**

6

7 **APROS:** For the record, can you, please, state your rank

8 and the first initial of your last name?

9

10 **WIT:** I'm Colonel first initial is M.

11

12 **APROS:** And you're current billet here at JTF, GTMO, sir?

13

14 **WIT:** I'm the commander of the Joint Detention Group.

15

16 **Presiding Officer:** I'm sorry, Lieutenant, you requested

17 the first initial of his last name, the witness

18 gave the first initial----

19

20 **WIT:** Oh, I'm sorry.

21

22 **Presiding Officer:** ----of his first name.

23

1 **APROS:** I'm sorry.

2

3 **WIT:** First initial of last name is B, bravo.

4

5 **Presiding Officer:** Thank you.

6

7 **APROS:** Yes, sir.

8

9 **Presiding Officer:** Captain Faulkner, you may proceed.

10

11 **DC:** Thank you, sir.

12

13 Colonel B. you're the same Colonel B. that

14 provided an affidavit on April the 6th, 2006

15 regarding the transfer of the Pre-Commission

16 detainees to Camp 5?

17

18 **WIT:** Yes, that's correct.

19

20 **DC:** Sir, if you could, please, describe for us the

21 conditions at Camp 5?

22

1 **WIT:** Camp 5 is a maximum security facility. It's
2 modeled after a federal prison in Miami, Indiana.
3 It houses--it has the capacity to hold up to 100
4 individuals. Each cell is a closed cell,
5 concrete, it has a metal door. It has a view
6 port. It has a bean hole to which we shackle the
7 hands.

8

9 **Presiding Officer:** Let me interrupt you for just a minute
10 while we reposition the microphone. I don't
11 believe you're being picked up.

12

13 **WIT:** Okay.

14

15 **DC:** And, sir, I've been made aware that there was no-
16 --there hasn't been any translation of the
17 response to my question.

18

19 **Presiding Officer:** Okay. Well, then, let's back up and
20 Colonel, if you can, to the extent you can pace
21 your responses so the translators can translate
22 them for----

23

1 **WIT:** Yes, sir.

2

3 **Presiding Officer:** ----for the accused.

4

5 Captain Faulkner, let me ask you to start again,
6 please.

7

8 **DC:** Sir, you are the same Colonel B. who provided an
9 affidavit on April 6th 2006, regarding the
10 movement of the Pre-Commission detainees to Camp
11 5?

12

13 **WIT:** Yes, I am.

14

15 **DC:** And if you could, sir, please, for us describe
16 the conditions at Camp 5?

17

18 **WIT:** Camp 5 is a maximum security facility. It has
19 the capacity to house up to 100 detainees. It is
20 constructed with four separate wings with two
21 tiers, i.e. two levels, a bottom floor and a top
22 floor. The cells are closed-in cells of a
23 concrete fabrication. They have a metal door.

1 That door has a view port. It has a what we
2 describe as a bean hole or a port which can be
3 opened through which the detainee can place their
4 hands to be shackled and/or through which we
5 conduct transactions, i.e. pass food,
6 medications, linen.

7
8 It has, inside of each cell, there are--there is
9 a bunk--a metal bunk. There is a latrine, a
10 western-style toilet. It has a water fountain.
11 There's a shower facility at the end of each
12 hallway.

13
14 There are two rec yards. Those rec yards consist
15 of what we refer to as pens, enclosed areas of a
16 wire fencing that you--normal type fencing that
17 you'd see in your backyard. And that's pretty
18 much a description of the facility itself.

19
20 **Presiding Officer:** Let me verify that the translation is
21 being broadcasted and is able to be understood.

22

23 [The defense translator and the accused conferred.]

1

2 **Translator:** Excuse me, Your Honor. The interpreter
3 requests that everybody speaks up and closer to
4 the microphone, please.

5

6 **Presiding Officer:** Yes, thank you. Captain Faulkner can
7 you----

8

9 **DC:** Yes, sir. It's my understanding that the last
10 couple of sentences didn't come through.

11

12 And I believe the last couple of sentences you
13 were talking about was----

14

15 **WIT:** The recreation area?

16

17 **DC:** Yes.

18

19 **WIT:** The recreation area is--we have two areas. They
20 are open--an open area that are enclosed with
21 metal fencing. The top is enclosed with a metal
22 fencing. It is a wire, mesh type fence.

23

1 **DC:** Yes, sir.

2

3 **WIT:** Detainees there are placed in there and in some

4 places up to two at a time can go in a recreation

5 pen, but in large part it is one at a time in

6 each pen.

7

8 **DC:** Sir, you mentioned a view port. How large is

9 this view port?

10

11 **WIT:** The view port, I would say, 12 inches [holding

12 his hands approximately 12 inches apart] by 12

13 inches thereabouts.

14

15 **DC:** Let the record reflect that the witness held his

16 hands approximately 12 inches apart.

17

18 **Presiding Officer:** You may.

19

20 **DC:** If a--if a--can a person in this cell see other

21 people in other cells?

22

1 **WIT:** No. He cannot. There--the methodology by which
2 detainees communicate on each tier is we open the
3 sally port--excuse me, the bean hole and the bean
4 hole you can look down and you might be able to
5 see another detainee's hand, but to make eye
6 contact would be very difficult.
7
8 **DC:** And how often are the bean holes open?
9
10 **WIT:** The bean holes are open during prayer--prayer
11 call. They are open to conduct another
12 transaction, i.e. to serve the food or----
13
14 **DC:** And you said the capacity is approximately 100?
15
16 **WIT:** 100.
17
18 **DC:** How many detainees are being held at Camp 5 now?
19
20 **WIT:** It's in the proximity of 75.
21
22 **DC:** How long has Camp 5 been in existence?
23

1 **WIT:** Camp 5 opened in May of 2004.

2

3 **DC:** What type of recreational time are the detainees
4 in Camp 5 afforded?

5

6 **WIT:** All detainees in Camp 5 are offered 2 hours of
7 recreation a day unless they're in a discipline
8 status. If they're in a discipline status--if
9 they're in a discipline status, it gets somewhat
10 complex for instance it ranges from 30 minutes up
11 to 2 hours.

12

13 **DC:** How much rec time do the Pre-Commission detainees
14 receive?

15

16 **WIT:** 2 hours.

17

18 **DC:** Do you know what time that happens?

19

20 **WIT:** It varies throughout the day. It will be offered
21 each day we rotate through the different tiers
22 and the blocks, so one day it may be the 5 to 7
23 the next day your tier may rotate to be the 7 to

1 9, the next day 9 to 11 and it just continuously
2 evolves.

3
4 One of the things we try to avoid is offering the
5 same tier because of the 2-hour recreation
6 requirement that I place, we have to, in essence,
7 really push that and manage the time, so what I
8 avoid is anybody always constantly being offered
9 a nighttime recreation though many of the
10 detainees much prefer the evening hours in the
11 nighttime. So if you got offered a nighttime rec
12 on one day, the next day you would be next in the
13 cue to get a daytime rec.

14
15 **DC:** Other than the Pre-Commission detainees, who is
16 housed at Camp 5?

17
18 **WIT:** Camp 5 is a--it houses a general population. We
19 have high value detainees there those being high
20 value detainees due to their intelligence value.

1 **DC:** Is there some sort of, I've read news articles
2 that talk about various levels. Are the
3 detainees classified on----
4
5 **WIT:** Yes.
6
7 **DC:** ----various levels? What are those levels?
8
9 **WIT:** We have four levels. We have highly compliant,
10 compliant, discipline, and segregation levels.
11 Within--if--I can--could go further. Within Camp
12 5, I house three of those levels.
13
14 **DC:** What three are those?
15
16 **WIT:** We have the highly compliant, compliant, and
17 discipline.
18
19 **DC:** And the other category is segregation?
20
21 **WIT:** Segregation, that's correct.
22
23 **DC:** Where are those detainees housed?

1

2 **WIT:** Segregation detainees are housed in Camp 3 in
3 Oscar Block.

4

5 **DC:** Of the 75 detainees at Camp 5, how many would you
6 say are highly compliant?

7

8 **WIT:** It is less than 5.

9

10 **DC:** And the Pre-Commission detainees that were moved
11 over there, three of the Pre-Commission detainees
12 that were moved there were moved to Camp 5 from
13 Camp 4?

14

15 **WIT:** That's correct.

16

17 **DC:** And----

18

19 **WIT:** I did not count those in that number.

20

21 **DC:** Okay. That was my question.

22

1 **WIT:** So--but I would continue to say that those
2 individuals were highly compliant so that would
3 take it more up to the range of eight to ten.

4

5 **DC:** What are the conditions of Camp 4?

6

7 **WIT:** Camp 4 is a communal camp. It has five bays we
8 call them. They are very--to describe it
9 generally it's a--they are metal structures that
10 house up to 40 individuals per. They are
11 separated into bays. There are four bays and
12 each bay houses ten individuals--up to ten
13 individuals. There's a central latrine facility
14 and shower facility in the center of each block.
15
16 Individuals in that camp are offered a much
17 greater freedom of movement. Inside of each bay
18 area is enclosed in a fence and we allow up to 20
19 individuals out at a time within each bay area,
20 and then there is a large rec yard in the center
21 of the compound, which we also will allow up to
22 20 individuals out. Inside of that area there is

1 a soccer field, a small soccer field
2 approximately, I'd say, 30 by 20; a volleyball
3 court; and a basketball court. And then there is
4 room around those three facilities for which
5 detainees can run.
6
7 **DC:** How many hours a day of rec time do the detainees
8 in Camp 4 receive?
9
10 **WIT:** They can range from as minimal would be 10 hours
11 where they're allowed out of their block up to 12
12 and sometimes more than 14 hours a day, but in
13 the large rec area, that is 2 hours a day.
14
15 **DC:** And at Camp 4, I assume, the--there's no effort
16 made to stop communication----
17
18 **WIT:** No.
19
20 **DC:** ----between or among anybody?
21
22 **WIT:** No. It would be impossible to do that.
23

1 **DC:** How does a detainee get to Camp 4?

2

3 **WIT:** A detainee goes to Camp 4 is a highly screened
4 process to where, perhaps I'll just start from
5 the beginning and tell you how we do it.

6

7 When my population at Camp 4 begins to drop below
8 the approximate number of--approximate number of
9 175, I start looking to do what we call the
10 vetting process. I then task my staff to come to
11 me with the top list of detainees who have had
12 the longest periods of time of compliant
13 behavior. Currently those that are being
14 considered as possible candidates for Camp 4 have
15 a minimum of 6 months of good behavior, i.e.
16 compliant behavior with guard force instructions,
17 have not carried out any types of assaults
18 against a guard.

19

20 We then establish that list. In essence, it's a
21 order of merit list with the longest compliant
22 behavior being at the very top. There's then a
23 forum where we meet with the Interrogation

1 Control Element at which time certain individuals
2 may be deemed highly uncooperative and they may
3 be vetoed, in essence, by the Interrogation
4 Control Element.
5
6 After we've gone through that process, that is
7 taken to the Commander of Joint Task Force and he
8 then approves recommendations of myself and the
9 Commander of the Joint Intelligence Group.
10
11 **DC:** Would you characterize all of the detainees at
12 Camp 4 as highly compliant?
13
14 **WIT:** Absolutely.
15
16 **DC:** And how many are in Camp 4 right now?
17
18 **WIT:** The approximate number is 175.
19
20 **DC:** So it--the way you described the process, it's
21 possible that a highly compliant detainee may
22 wait on some sort of list, a waiting list if you

1 will, before ever being even allowed to go into
2 Camp 4?

3

4 **WIT:** Well, that would not be a--close to an accurate
5 characterization. Once the list is approved, we
6 only vet that number which I have the capability
7 to house at that time and I immediately exhaust
8 that list and then it's just held in abeyance
9 until I have a, if you will, room in that camp.
10 I think it would be of interest to note that many
11 detainees decline to go there, so if I vet 13 in,
12 often times when we go to an inmate 99 percent of
13 the time they're coming out of Camp 1, anywhere
14 from 40 to 50 percent will decline going over to
15 Camp 4--30 to 50 percent will decline.

16

17 **DC:** Why is it that 99 percent come from Camp 1?

18

19 **WIT:** Camp 1 is a compliant camp and that sort of like
20 the next step up to Camp 4 which is--really Camp
21 4 is the place where you get the status of highly
22 compliant.

23

1 **DC:** Okay.

2

3 **WIT:** That--it's almost one in the same.

4

5 **DC:** Okay so then a follow-up to that would be then

6 how did five highly compliant end up at Camp 5?

7

8 **WIT:** They were individuals who were giving special

9 consideration to what we call the 508 process in

10 that they were very compliant with us, very

11 cooperative with their interrogators, and they're

12 very compliant and very cooperative and so they

13 were given special amenities. In some occasions,

14 they were given special housing, but due to

15 security concerns and other concerns they have

16 had to been moved to Camp 5 where I could provide

17 greater security for them.

18

19 **DC:** What type of security concerns?

20

21 **WIT:** That which another detainee would carry out an

22 assault upon them for information that they had

23 provided.

1

2 **DC:** So actually of those--of the five highly
3 compliant that are at Camp 5 non Pre-Commission
4 detainees there are specific threats, perhaps--or
5 specific threats against them that you feel that
6 they need the extra protection----

7

8 **WIT:** Yes.

9

10 **DC:** ----of Camp 5?

11

12 **WIT:** Yes. That's correct.

13

14 **DC:** What--what is Camp 6?

15

16 **WIT:** Camp 6 is a new facility under construction.
17 It's anticipated to open in the August time
18 frame. It is modeled after a county prison in
19 Michigan. It will house up to 225 detainees. It
20 is constructed in the fashion that, very simply
21 put, allows me to carry out the security posture
22 that we have in Camp 1 and Camp 5 with
23 individuals cells, but at the same time, there is

1 a pod outside of each cell where I can allow up to
2 20 individuals much like the Camp 4 fashion. So
3 it's a combination of providing me a security and
4 allowing greater freedom of movement for the
5 detainees.

6

7 **DC:** Would you characterize Camp 6 as more like Camp 5
8 or more like Camp 4?

9

10 **WIT:** Well, it's more like Camp 5 in that it's a modern
11 facility. It's more like Camp 6 in that
12 detainees will have significant amount of time
13 outside of their cells. I mean they will have
14 really it would be up to the commander at the
15 time and that commander being myself how long
16 they would be locked down for sleep period which
17 generally would go from 2200 hours until first
18 call to prayer. So other than that time frame,
19 as long as the detainee will be--are compliant,
20 it is my current intention that they will be
21 allowed out immediately into the pod outside of
22 their cell where they'll be able to speak freely
23 with and interact freely with other detainees.

1

2 Additionally, there's another rec yard that is
3 right off the side of each pod and so they will
4 be allowed greater recreation there and in
5 addition, there is a large soccer field being
6 created where I intend to allow up to 2 hours of
7 soccer there. So they'll have the recreation
8 time of not being locked down, if you will, will
9 be very equivalent to that in Camp 4.

10

11 **DC:** Would you agree that the location where a
12 detainee is held is, other than the Pre-
13 Commission detainees, is based solely on their
14 behavior?

15

16 **WIT:** No. There's some individuals that are held in
17 certain places for intelligence value.

18

19 **DC:** But not on--not on what they're giving
20 interrogators? Are certain people housed places
21 just because of what they're providing
22 interrogators?

23

1 **WIT:** Yes.

2

3 **DC:** Can a person make it to Camp 4 just because they-

4 ---

5

6 **Presiding Officer:** Excuse me. Let me interrupt you at

7 this point. We'll have a brief recess so

8 everyone can refresh themselves. We've been at

9 this for nearly an hour, so with that, the

10 Commission will be in recess. Thank you.

11

12 *The Commission Hearing recessed at 0951, 26 April 2006.*

13

14 *The Commission Hearing was called to order at 1017, 26*

15 *April 2006.*

16

17 **Presiding Officer:** This Commission will come to order.

18

19 **APROS:** All parties present when the Commission recessed

20 are again present.

21

22 **Presiding Officer:** Thank you. Captain, you may proceed.

23

1 **DC:** Thank you, sir. Sir, I noticed during the break
2 that several people came up and talked to you.
3 Were your discussions with any of those people in
4 regards to your testimony here today?
5
6 **WIT:** I was asked by one gentleman if I objected to the
7 use of my name. Beyond that, no.
8
9 **DC:** Okay. Sir, if we could go back to the rec time
10 at Camp 5 briefly. You said that detainees
11 received between 30 minutes and 2 hours?
12
13 **WIT:** That is correct.
14
15 **DC:** How is that decided? Who gets 30 minutes? Who
16 gets 2 hours?
17
18 **WIT:** That is decided by me and a senior chief that
19 works for me in the Detainee Operations Center.
20 We have a general matrix developed; in essence,
21 it is the amount of time that you have in
22 discipline.
23

1 Initially the first 48 hours, you will not go to
2 rec, and then you get 30 days. It is a graduated
3 scale over the period of time you are in
4 discipline to where within the last week you are
5 serving in discipline, say discipline would be a
6 30-day stint, that last week you would be up to 2
7 hours.

8
9 This is a relatively new thing we have just put
10 in. It has just started within the last 2 weeks.
11 Prior to that, discipline status detainees were
12 only allowed 20 minutes of recreation three times
13 a week.

14
15 **DC:** And sir, if you could put some pauses in your
16 answers.

17
18 **WIT:** Yeah, I am sorry.

19
20 **DC:** It is okay.

21
22 **WIT:** I will do better.

23

1 **DC:** So even discipline detainees can get 2 hours of
2 recreation a day?
3
4 **WIT:** Yes, that is correct.
5
6 **DC:** But if everybody at Camp were getting 2 hours of
7 recreation a day, it would be impossible. It is
8 impossible to give every detainee at Camp 5 2
9 hours of recreation a day.
10
11 **WIT:** No, we can do it, but I would note, significant
12 note, most detainees--well I shouldn't say that.
13 We average about 35 detainees a day in Camp 5
14 that refuse recreation. They will run from a low
15 of, I would say in the last 8 months, the lowest
16 I have ever seen is 29 refusals, 28 refusals, in
17 a day. It is often time a form of protest to
18 refuse rec.
19
20 **DC:** Okay, sir. If we could move on to how the pre-
21 commission detainees got to Camp 5. Who
22 ultimately approved the plan to move all of the
23 pre-commission detainees to Camp 5?

1

2 **WIT:** The general concept was approved by the
3 Commanding General at the time, who was Major
4 General Hood.

5

6 **DC:** When you say, "the general concept" what do you
7 mean by that?

8

9 **WIT:** In the January to February timeframe, I had to go
10 through various courses of action to present to
11 him on how I would reconfigure the camps, and I
12 presented to him concepts of where I would, in
13 essence, it boiled down to in this very
14 particular instance that I would take all
15 Commissions candidates and place them in Camp 5
16 and so he approved that as a particular.

17

18 **DC:** And was this plan staffed through various
19 agencies in the JTF?

20

21 **WIT:** Absolutely.

22

23 **DC:** Who all did it go through?

1

2 **WIT:** It would be easier to say who it did not go to
3 and it is no one. As the whole process unfolded,
4 to give you a better understanding, perhaps
5 understanding of how it transpired; weekly I meet
6 with the Commander of the Joint Task Force and
7 during that period of time during that weekly
8 meeting, I present any issues to him that he has
9 to make a decision on. In attendance at that
10 meeting is representatives of his full staff of
11 every subordinate Command element.

12

13 So my staff does the prior coordination full wide
14 within the Joint Task Force and then the actual
15 decision briefing, that he is taking there are
16 full representatives of all organizations within
17 the Joint Task Force.

18

19 So the very simple answer is very broad, no one
20 excluded.

21

22 **DC:** Was anyone from outside the Joint Task Force
23 consulted?

1

2 **WIT:** Negative.

3

4 **DC:** Is there a written decision? Is there a written

5 version of this plan?

6

7 **WIT:** No, I had a VOCO that your plan is approved; move

8 forward.

9

10 **DC:** Is your plan written?

11

12 **WIT:** Of--no, because it is really--I can describe it

13 to you in three sentences.

14

15 **DC:** Okay, please do.

16

17 **WIT:** Close camps 2, 3, with the exception of

18 segregation and discipline blocks. Move all the

19 population into Camp 1 other than the segregation

20 and discipline. Move Commissions to Camp 5.

21 Maintain population of roughly 80 percent in Camp

22 5. Maintain approximate population of 175 in

23 Camp 4, and the remainder would be in Camp 1.

1

2 **DC:** And so this plan that was apparently approved by
3 everyone on the JTF Staff. There is no written
4 approvals, suggested changes, email traffic?

5

6 **WIT:** Well the plan, I don't think it is all verbal.
7 The plan was, as we do most decisions, in the
8 Joint Task Force, are PowerPoint slides presented
9 laying out the concept. There were--my staff may
10 well have had email exchanges. Myself, I
11 conferred with the JIG Director and the SJA
12 personally. Beyond that, that is the level of
13 coordination.

14

15 **DC:** Do these briefing slides on PowerPoint still
16 exist?

17

18 **WIT:** Yes, I am sure they do.

19

20 **DC:** Are they readily accessible to you, if you had
21 your computer?

22

1 **WIT:** I don't keep them on mine, but I am sure my S-3
2 has got them.
3
4 **DC:** But there is essentially no, other than just your
5 personal conferences with the SJA and who else
6 did you say?
7
8 **WIT:** The Director of the Joint Intelligence Group.
9
10 **DC:** The Director of the Joint Intelligence Group,
11 there is no written approvals, no written
12 concurrences, no written opinions of any sort?
13
14 **WIT:** No, I mean I would make it clear that movement
15 within the camps is something we do rather
16 routinely. I mean, it is not like a huge
17 overwhelming deal with us.
18
19 I mean, we have close to--I have had over 535
20 people where I have to move them when we do
21 within a month's period, I will do close to 500
22 moves a month. It is not like that grand of a

1 deal, and I hate to say it, to me, it is part of
2 my routine. I have to do it almost daily.
3
4 **DC:** But this was a decision, a briefing, that was
5 presented to the JTF Commander?
6
7 **WIT:** Yes.
8
9 **DC:** And----
10
11 **WIT:** As a concept. As a changing concept as to where
12 we would move and house people.
13
14 **DC:** But----
15
16 **WIT:** The main focus of the briefing was not about the
17 Commissions. That really was a very small piece
18 of it.
19
20 Really, that was a bottom-line level. The real
21 issue was me closing a camp. Which camp was I
22 going to close and how was I going to
23 accommodate? Where was I going to be to be able

1 to get the populations to fit so as to maximize
2 the guard force? That was the real issue.
3
4 The Commissions issue, that was a side issue, a
5 very, very small issue.
6
7 **DC:** So the consolidation of all the Commission
8 detainees into one location is not a big deal?
9
10 **WIT:** I didn't say it was a big deal. The----
11
12 **DC:** It is a small----
13
14 **WIT:** I said it was a small issue in the whole of which
15 I had to deal with.
16
17 **DC:** Okay, and one of the reasons you say that you
18 consolidated the Commission detainees was because
19 of a reduction in the number of camps and the
20 closing of various camps?
21
22 **WIT:** That is correct.
23

1 **DC:** Did all of the Commission detainees need to be
2 moved to Camp 5 in order to effectuate this
3 consolidation?
4
5 **WIT:** For me to effectively use all bed space in the
6 right camps, it was a piece of the puzzle.
7
8 **DC:** Several of the detainees were already in Camp 5,
9 the Commission detainees?
10
11 **WIT:** That is--just give me a second.
12
13 [Pause.]
14
15 **WIT:** I think the number is three. That is one of
16 those--I think the number was three.
17
18 **DC:** Three of them were already in Camp 5?
19
20 **WIT:** Yes.
21
22 **DC:** And three of them were in Camp 4?
23

1 **WIT:** Three in Camp 4.

2

3 **DC:** And the remainder, which would be four?

4

5 **WIT:** I had two in Camp 1, so that would be eight. I

6 had one in discipline, that is nine, and I am

7 missing somebody. I can't recall the other guy.

8 It may perhaps have been four in 5.

9

10 **DC:** Camp 4 is not scheduled to close?

11

12 **WIT:** No, Camp 4 will stay open.

13

14 **DC:** Would the presence of Mr. Barhoumi in Camp 4

15 somehow impact the use--the efficient use of the

16 guard force?

17

18 **WIT:** Yes.

19

20 **DC:** How so?

21

22 **WIT:** Because that is another space I can use in Camp 4

23 that I can put another compliant detainee in.

1

2 **DC:** Mr. Barhoumi was already in Camp 4.

3

4 **WIT:** But I can move him out.

5

6 **DC:** Under that logic, couldn't you also move the
7 person that you were going to put in over to Camp
8 5?

9

10 **WIT:** No, because he would be a highly compliant
11 detainee who would be entitled to the greater--
12 not entitled; who I would be giving the greater
13 privileges to.

14

15 **DC:** Mr. Barhoumi was highly compliant?

16

17 **WIT:** He was highly compliant but he was a Commissions
18 candidate and a point that I think has been
19 missed so far that I have not articulated yet is
20 that my move of putting those pre-commissions
21 candidate or commissions candidates are based off
22 of three documents.

23

1 **DC:** Well, sir, I don't want interrupt you and I am
2 going to get to your other issue and we will talk
3 about that, but from the perspective solely of a
4 use of manpower, it is just a numbers game,
5 right?
6
7 **WIT:** Yes.
8
9 **DC:** So whether it is Mr. Barhoumi in Camp 5 or Mr.
10 Jones in Camp 5 or Camp 4, it doesn't really
11 matter?
12
13 **WIT:** No, I wouldn't say that because I have to deal
14 with the detainees. For every detainee in Camp 1
15 that--half the population of Camp 1 wants in Camp
16 4 and they think they are entitled to it just as
17 much Mr. Barhoumi.
18
19 **DC:** And everybody in Camp 4 believes that they are,
20 as you say, entitled to stay in Camp 4 so long as
21 they are following the rules.
22

1 **WIT:** Everybody in Camp 5 thinks they are entitled to
2 be in Camp 4. Everybody in Camp Echo thinks they
3 are entitled to be in Camp 4. Everybody thinks
4 they are entitled to be in Camp 4.
5
6 **DC:** But a person that was moved out of Camp 4 over to
7 Camp 5 would understandably feel like he was
8 being punished in some way, wouldn't he?
9
10 **WIT:** No. I have people everyday that say, "I want out
11 of Camp 4."
12
13 **DC:** The people who are----
14
15 **WIT:** I just moved one yesterday or 2 days ago that
16 wanted out of Camp 4. He said, "I don't like it
17 here. I want out."
18
19 **DC:** The people who are not asking to be moved out
20 would feel like they are being punished.
21
22 **APROS:** Objection. That calls for speculation.
23

1 **Presiding Officer:** Well I will allow it.

2

3 **WIT:** I would say that it is very clear that you are
4 going to give up a greater amount of recreation.
5 So, if you ask me a question such as, "What is my
6 personal preference of where I would like live?"
7 I wouldn't live in 4.

8

9 **DC:** Okay. Sir, a few minutes ago you said that you
10 had to move Mr. Barhoumi from Camp 4 over to Camp
11 5 and in the context that we were discussing was
12 the consolidation and you said that that allowed
13 for you to move somebody else into Camp 4?

14

15 **WIT:** That is correct.

16

17 **DC:** It didn't have to be Mr. Barhoumi that moved out
18 of Camp 4, it could have been anybody out of Camp
19 4?

20

21 **WIT:** Well yeah, I could take Camp 4 and take all 175
22 of them out and move them somewhere else and then
23 I can move another 175 in, but I am afraid I am

1 just honestly and sincerely, I do not follow your
2 logic right now on your question.
3
4 **DC:** Why did it have to be Mr. Barhoumi that moved out
5 of Camp 4?
6
7 **WIT:** Because of the reason that you want me to answer
8 right now.
9
10 **DC:** Okay, lets talk about that. In your affidavit
11 you talk about a couple of Army regulations that
12 require that pretrial prisoners be separate from
13 post-trial prisoners.
14
15 **WIT:** That is correct. There are two Army regulations
16 and it is consistent with the III Geneva
17 Convention as well that I would house them
18 separately.
19
20 So the one Army regulation, Army Regulation 190-
21 8, concerning enemy prisoners of war and
22 detainees, other detainees, that Geneva

1 Convention, the III Geneva Convention serves as
2 the underpin for that.

3

4 So, in all three instances of what I look to for
5 basic guidance in how I run the camps, those are
6 my three major reference documents; the III
7 Geneva Convention; AR 190-47, the Army
8 Correctional System; and AR 190-8. All three of
9 those give me the same answer.

10

11 **DC:** Do you know where in 190-8 that is says to do
12 that?

13

14 **WIT:** If you have a copy of 190-8 in front of you, I
15 can find it. I can tell you that in 190-47 it is
16 Chapter 11. In the III Geneva Convention it is
17 Article 103, and in 190-8 it is toward the back
18 portion of the regulation.

19

20 **DC:** And what do those regulations, in general, say?

21

22 **WIT:** 190-47 tells me that a pretrial should be given
23 recreation separately from pretrial, that they

1 should not work with pretrial, and that they
2 should be billeted separately. That pretrial
3 should be billeted separately.

4
5 AR 190-8, consistent with the III Geneva
6 Convention, says that individuals who are going
7 before a trial for either hostilities or during
8 hostilities, if you will, war crimes, that they,
9 if they are--if they have committed an offense
10 that a member of those forces of the detaining
11 power's forces had committed, if the same offense
12 for the detaining power's forces was committed by
13 a member of their forces, if they would have
14 confinement, that they too should be placed in
15 confinement.

16
17 You have to understand the context of the III
18 Geneva Convention and AR 190-8, which they speak
19 of prisoner of war operations in that it is
20 closer to what the ICRC says and as they are the
21 recognized authority for the interpretation of
22 the III Geneva Convention, that Camp 4 is

1 equivalent to that envisioned by the III Geneva
2 Convention.

3

4 So when the III Geneva Convention and AR 190-8
5 speaks of confinement, they are speaking in terms
6 of closed-cell confinement, that which is akin to
7 Camp 5.

8

9 **DC:** Who at Guantanamo is not pretrial?

10

11 **WIT:** I would say there are quite a few people not
12 pretrial. I know of 10 people who are pretrial.
13 The rest are defined to by the Department of
14 Defense as enemy combatants. I know that there
15 are over 140 individuals that the Department of
16 Defense is considering for transfer.

17

18 **DC:** Have any of them been tried?

19

20 **WIT:** I don't know if you call this a trial or not? If
21 this process here--I would define as a trial and
22 that is what I use as definition, that this is a
23 trial. So the 10 current Commission candidates

1 are what I consider, in this context, to be a
2 trial.

3

4 **DC:** Has anybody at Guantanamo been convicted of any
5 crime?

6

7 **WIT:** Not yet.

8

9 **DC:** And----

10

11 **WIT:** And now I see the point that you are trying to
12 get at is that somebody who is pretrial is
13 different than post-trial. The intent of all the
14 Army regulations, both 47 and 190-8, and 190-8 in
15 particular and consistent with the III Geneva
16 Convention, is that you categorize people by
17 their different statuses.

18

19 Frankly, there is no current guidance that
20 envisions what we are in, so that is why I have
21 to use various different reference documents.

22

1 **DC:** But the regulations which you have referenced
2 specifically talk about pretrial versus post-
3 trial, correct?

4
5 **WIT:** Not 190-8. If we take 190-8 in its purest sense,
6 just--if you take 190-8, just the mere fact that
7 he is going through a trial process means that I
8 can put him in confinement; means that I should
9 put him in confinement. If a member of the
10 detaining power's forces had committed a similar
11 type of offense.

12
13 **DC:** It says that you should put them in confinement
14 but it doesn't say that you should put the people
15 that are facing trial together.

16
17 **WIT:** It says to put them in confinement. Then AR 190-
18 47 says I should segregate those individuals from
19 everyone else. Then the effectiveness--I cannot
20 segregate anybody and have 10 separate
21 cellblocks. I do not have the guard force.

22

1 So, operational concerns are such that I have to
2 consolidate them because they are the only
3 population that can be allowed together.
4
5 **DC:** 190-47 simply says that pretrial should be
6 segregated from post-trial?
7
8 **WIT:** That is correct.
9
10 **DC:** And there are no post-trial prisoners here?
11
12 **WIT:** The spirit of 190-47, as I interpret it, is that
13 it means pretrial should be segregated from those
14 other populations 190-47 does not have another
15 category to which it would speak. That is where
16 I have to balance 190-8 against 190-47.
17
18 **DC:** You have mentioned it a couple times, the spirit,
19 but the words of 190-47 are pretrial and post-
20 trial.
21
22 **WIT:** That is correct.
23

1 **DC:** There is no generalization that pretrial should
2 separated from some others.
3
4 **WIT:** Perhaps I can help you. There is nothing
5 prescriptive telling me that I have to do this,
6 that, or the other thing. I have to choose and
7 this is my call. I have to look at pieces of
8 guidance from 190-47, 190-8, the III Geneva
9 Convention, and make the best decision I can
10 combining all those, because there is no singular
11 one document that covers the operations in
12 Guantanamo. It is something that I have to live
13 with everyday in all my operations. Everything I
14 do is informed with those documents.
15
16 **DC:** But the documents that are informing you are
17 telling you to separate pretrial and post-trial.
18
19 **WIT:** That is correct.
20
21 **DC:** And nobody here is post-trial.
22

1 **WIT:** But 190-8 would tell me that I should confine
2 him.
3
4 **DC:** And he is confined?
5
6 **WIT:** No, not in the context of 190-8. If you were
7 confined in Camp 4, Camp 4 would be akin to an
8 enemy prisoner of war camp, 190-8 version. So,
9 take what 190-8 tells you to do with enemy
10 prisoners of war and other detainees. In that
11 context, a detainee would be living in setting
12 like Camp 4. It then says that if an individual
13 is going before a trial, then he can be, should
14 be, confined in--if a member of the same forces--
15 if you take that caveat, then he should be
16 confined. Confinement in that context means
17 closed-cell confinement. That which, we actually
18 have in Camp 1 and that is one of our
19 inconsistencies that we currently or why
20 Guantanamo operations are not in full compliance
21 with the III Geneva Convention, because some
22 individuals are held in closed-cell confinement,
23 i.e. Camp 1 and Camp 5.

1

2 **DC:** Your assertion is that Camp 4 is not confinement?

3

4 **WIT:** Camp 4 is a medium security facility and it is,
5 in the context of 190-8, a prison camp equivalent
6 to an enemy prisoner of war camp.

7

8 **DC:** But it is not confinement?

9

10 **WIT:** In the context of 190-8, it is not confinement.
11 It is an enemy prisoner of war camp. It would be
12 more akin to that than confinement in the way
13 that 190-8 is written.

14

15 **DC:** Where are the pre-commission detainees held at
16 Camp 5?

17

18 **WIT:** They are held in Charlie, lower. That is the
19 first floor of Charlie wing.

20

21 **DC:** All of them?

22

23 **WIT:** All of them.

1

2 **DC:** All 10 are in one wing.

3

4 **WIT:** All 10 are not there presently.

5

6 **DC:** How many are not there?

7

8 **WIT:** Two are not there presently.

9

10 **DC:** Why not?

11

12 **WIT:** One is there due to a court order from a Federal
13 District Court of last summer, that his case is
14 pending going before the Supreme Court, so he is
15 not there.

16

17 And there is one other individual who is Camp 1,
18 who frankly for operational reasons, I am deemed
19 necessary to hold him there for a period of time,
20 but he will move to Camp 5 and he knows he will
21 move to Camp 5.

22

23 **DC:** When will he move to Camp 5?

1

2 **WIT:** When operational reasons allow me to move him
3 over there.

4

5 **DC:** Why are all the pre-commission detainees in the
6 same wing or tier?

7

8 **WIT:** If I put them on other tiers they would be mixed
9 in and would be inconsistent with the guidance of
10 190-47. So if I move them to Charlie upper or
11 Alpha lower they would then be billeted in the
12 same area as those other individuals.

13

14 **DC:** But that is okay for the one guy with a federal
15 court order?

16

17 **WIT:** The federal court order I am afraid trumps what I
18 do and how I do business.

19

20 **DC:** So they don't have to be together?

21

22 **WIT:** The have to be is my interpretation of the
23 guidance from two Army regulations and the III

1 Geneva convention. That is all the have to be
2 that there is, and concern for the security and
3 safety of the detainees, which is really the
4 underpin of all of what I am talking about.
5
6 **DC:** What happens if more detainees are charged?
7
8 **WIT:** Then I have to consolidate and move people. I
9 would create another tier. If we have five more,
10 I will empty a tier, consolidate, and I will
11 create another tier.
12
13 **DC:** What if there is 100 more?
14
15 **WIT:** I would consolidate, more, and empty a whole
16 facility.
17
18 **DC:** 200?
19
20 **APROS:** Objection, speculation.
21
22 **WIT:** I would move----
23

1 **Presiding Officer:** Excuse me, Colonel, there is an
2 objection pending.
3
4 **APROS:** This is all speculative at this point. It is not
5 relevant for the disposition of this motion,
6 whether or not we try 100, 200, 300 people and
7 what he would do in the event we ever do that.
8 It is just not necessary.
9
10 **Presiding Officer:** Captain?
11
12 **DC:** Sir, it goes to test the basis of his--of the--of
13 his--the very foundation of why he is moving all
14 of the pre-commission detainees into separate
15 wings and if he would continue to do so if there
16 were 100, 200, or 490 Commissions proceedings.
17
18 **Presiding Officer:** All right, I find that it is
19 instructive for the thought process. The
20 objection is overruled. You may continue.
21
22 **DC:** If there were 200, you would consolidate all 200
23 at one location?

1

2 **WIT:** I can immediately answer with 100, I would; 200 I
3 would have to begin to give a thought as to how I
4 would do it, but that would be my objective.

5

6 **DC:** At some point, it is possible that there would be
7 so many Commissions that Commissions detainees
8 would be held in Camp 4?

9

10 **WIT:** No.

11

12 **DC:** That is not possible?

13

14 **WIT:** I would not see that happening because there
15 would be--I would then put them in confinement in
16 a max security facility. I have multiple max
17 security facilities. I have Camp 1 where I can
18 house well over 200 individuals. I have Camp 2,
19 3, where I can house well over 200 people.

20

21 So I have maximum-security facilities. If the
22 individual that I talked about that is not in
23 Camp 5, he is in a maximum-security facility.

1

2 One of the problems of Camp 4 that I have not
3 made clear is that it is a medium-security
4 facility and for someone to be charged in a
5 Commissions trial and this process, to be in a
6 medium-security facility means I have not imposed
7 a level of security appropriate to the potential
8 risk that could be there.

9

10 **DC:** What is the risk?

11

12 **WIT:** The risks are several. There is risk of escape.
13 There is risk of harm to the detainee either be
14 other detainees or risk of harm that he would
15 impose upon himself.

16

17 **DC:** Why did it take so long to consolidate the pre-
18 commission detainees?

19

20 **WIT:** When you--and I don't mean to sound
21 argumentative, but when you say, "why did it take
22 so long?" I don't--I would not say that it did.

23

1 **DC:** If the consolidation was a result of abidance by
2 regulations and Geneva Conventions--I mean, are
3 you aware that Mr. Barhoumi was designated for
4 Commissions in July of 2004.
5
6 **WIT:** Frankly, I am not aware of that.
7
8 **DC:** That he was charged in November of 2005.
9
10 **WIT:** That I am aware of.
11
12 **DC:** So from November of 2005 until March 30th, on or
13 about, 2006, he was in Camp 4, right?
14
15 **WIT:** That is correct?
16
17 **DC:** Did he ever try to escape?
18
19 **WIT:** Not to my knowledge.
20
21 **DC:** Was there ever any threats or was he ever the
22 target of any attacks?
23

1 **WIT:** No, but if I may answer this in context of the
2 way I viewed it; is that the Commission's process
3 was not, at that time, full blown, so we were not
4 putting ourselves in that position of which the
5 things that can transpire, the real reason why we
6 have AR 190-47, those things were not impending,
7 but again, there is no singular one little silver
8 bullet in any answer I give because everything is
9 taken as a whole.

10

11 In that, operational concerns of closing camps
12 was upon me, so that was a very large part of
13 driving this whole process. Over time, there was
14 no doubt in my mind that we were going to
15 consolidate them, it was just the next thing I
16 had to get to.

17

18 **DC:** I believe there were hearings scheduled as far
19 back as August of 2004 or '05 in one of the
20 detainee's cases. That didn't strike a chord
21 that there might be some pending trials?

22

1 **WIT:** We had the individuals that I knew that were in
2 the queue that were lined up were housed in
3 segregated block in a maximum security facility
4 where they were not with the population.
5
6 **DC:** Is that the T Block at----
7
8 **WIT:** That is correct.
9
10 **DC:** And what are the conditions like there?
11
12 **WIT:** That is the--the difference is that is a very
13 long tier--it is slightly different it is just
14 because it has a smaller number of cells but the
15 difference in that and in Camp 5 setting is that
16 in Camp 5 it is a totally enclosed cell with a
17 wall, a solid wall. In Camp 2, and 3, and 1, it
18 is a mesh screen so you can see the detainee next
19 to you to, to your left or to your right, or
20 across the tier, but it is an enclosed closed
21 confinement cell.
22
23 **DC:** And that is at Camp 1?

1

2 **WIT:** That is camps 1, 2, and 3.

3

4 **DC:** This Tango block?

5

6 **WIT:** Tango is in Camp 3.

7

8 **DC:** Okay, do you know how long Mr. Barhoumi has been
9 at Camp 4?

10

11 **WIT:** I really can't answer that. He has been at it
12 for quite a period of time but I don't have the
13 dates. I can get those with a phone call. I can
14 get those if you need.

15

16 **DC:** Would it sound approximately correct to you that
17 he has been there since the spring of 2005?

18

19 **WIT:** I couldn't really say. I wouldn't surprise me.

20

21 **DC:** In the time that he was in Camp 4, are you aware
22 of any threats or him being the target of any
23 attacks?

1

2 **WIT:** No, I am not.

3

4 **DC:** Are you aware of him making threats against any
5 other people in Camp 4?

6

7 **WIT:** I am not.

8

9 **DC:** Of the three detainees that were moved from Camp
10 4 to Camp 5, one of those detainees was the
11 target of threats made by another detainee?

12

13 **WIT:** He was in a position such that had information he
14 provided been known to the wider population, he
15 clearly in my mind would have been in a position
16 of threat against him.

17

18 **DC:** Weren't there specific threats made against him
19 or that you were made aware of by another
20 detainee?

21

22 **WIT:** Specific, meaning I will retaliate against him?

23

1 **DC:** Yes, sir.

2

3 **WIT:** No, it was more of the information that--if that
4 information gets to that guy and that guy will,
5 because it was very incriminating against another
6 individual, that he would carry out something
7 against him because of its incrimination and
8 because they both were going to be sitting in
9 these proceedings. And again, that is another
10 reason why we have these----

11

12 **Presiding Officer:** Excuse me. Let me interrupt for just a
13 moment. You said since the Spring of 2005, you
14 wouldn't disagree that Mr. Barhoumi was in Camp
15 4, is that right?

16

17 **WIT:** Yes, sir. That would not surprise me that he was
18 there. I can find the exact dates of when he
19 arrived but----

20

21 **Presiding Officer:** No, what I didn't understand is that at
22 the same time you are talking about other
23 detainees who were pending Commissions and there

1 was a situation that you considered with respect
2 to one that may have been threatening?
3
4 **WIT:** Yes, sir.
5
6 **Presiding Officer:** Okay, thank you. Please proceed.
7
8 **DC:** Are you aware of any behavioral problems with Mr.
9 Barhoumi?
10
11 **WIT:** No, I am not.
12
13 **DC:** So the only reason that Mr. Barhoumi was moved
14 from Camp 4 to Camp 5 was that he was pre-
15 commission?
16
17 **WIT:** That is correct.
18
19 **DC:** Are either Camps 4 or 5 set to close?
20
21 **WIT:** No.
22
23 **DC:** And have Camps 2 and 3 closed?

1

2 **WIT:** With the exception of the segregation and the
3 discipline blocks, they have closed. They did
4 house other populations.

5

6 **Presiding Officer:** I am sorry, which ones?

7

8 **WIT:** Camps 2 and 3, sir.

9

10 **Presiding Officer:** Thank you.

11

12 **DC:** What is the capacity of all the camps?

13

14 **WIT:** Over 1,300.

15

16 **DC:** And when you say that Camps 2 and 3 are going to
17 close, exactly what does that mean?

18

19 **WIT:** It means that we would no longer use those
20 facilities, those blocks within that camp.

21

22 **DC:** Would they be torn down?

23

1 **WIT:** No, they would be, in essence, a mothball status.

2

3 **DC:** I would like to go back, just for a minute, to
4 exactly--you said that Mr. Barhoumi was only
5 moved because he was pre-commission.

6

7 **WIT:** That is correct. May I?

8

9 **DC:** Sure.

10

11 **WIT:** Pre-commissions, again, the real baseline for my
12 whole motivations in everything is running a
13 peaceful, safe, and secure camp. And that--in
14 doing that means that I have to take care of him
15 and I have to ensure his safety. I take that
16 task very seriously. And I feel strongly that I
17 have him in the best possible location to ensure
18 his safety during this process.

19

20 **DC:** But you are not aware of any threats to his
21 safety.

22

1 **WIT:** There is a general threat, in my dealings of law
2 enforcement and corrections, which I do not have
3 that great of a correctional background, but I
4 can tell you that during the trial process, it is
5 very commonly known among those in the law
6 enforcement corrections field, that is the
7 greatest time at which an individual would
8 undergo threat. And so, and that is a general
9 knowledge----

10

11 **DC:** A threat from someone else?

12

13 **WIT:** A threat from someone else or a threat to
14 himself, because during the trial process
15 individuals can become despondent. Things can
16 happen and so they sometimes will turn to self-
17 injurious behavior.

18

19 **DC:** But have you ever observed Mr. Barhoumi engage in
20 self-injurious behavior?

21

22 **WIT:** I have not, but in this circumstance and in all
23 correctional environments, you have to know of

1 what exists out there and you have to know that
2 your greatest priority is ensuring safety and
3 security.

4

5 My next concern down the line, much further down
6 the line, is improving detainee's quality of
7 life, which I have put a significant amount of
8 energy into.

9

10 But someone's quality of life compared to their
11 safety and security is a lot a different on the
12 Maslow's theory of hierarchy and needs the last
13 time I looked at it.

14

15 **DC:** But you would agree that Mr. Barhoumi, as a
16 result of moving from 4 to 5 suffered a decrease
17 in quality of life?

18

19 **WIT:** I would say that if you think that having more
20 recreation time is more important than being safe
21 and secure then that would be a judgment that you
22 would make. I would not make that judgment.

23

1 **DC:** If a person pending trial is in such danger of
2 either injury to himself or injury from others,
3 why wasn't Mr. Barhoumi moved to Camp 5 when he
4 was designated in 2004, when he was charged in
5 November of 2005, when he received a lawyer on 5
6 December of '05, when his charges were referred
7 on 16 December of '05, when----
8
9 **APROS:** Objection, this is a compound question.
10
11 **DC:** Why wasn't he moved----
12
13 **Presiding Officer:** Sustained.
14
15 **DC:** Why wasn't he moved when charges were--when he
16 was designated in 2004?
17
18 **WIT:** I suppose the best answer I could give, is that
19 perhaps you could lay that at my incompetence.
20
21 **DC:** I mean, Camp 5 was there in 2004, correct, sir?
22
23 **WIT:** That is correct.

1

2 **DC:** So he could have been moved?

3

4 **WIT:** He could have. If, again, to my knowledge I did
5 not become aware that he was a candidate and I am
6 just trying to put together in my head a timeline
7 here, I dealt with the bulk of my time here, I
8 have dealt with the three, and not until the very
9 latter portion of last year did I become aware
10 that others were being charged.

11

12 **DC:** But there----

13

14 **WIT:** And again, there is only one real reason why they
15 weren't and it is to my failure to move out and
16 move on the issue. It is my failure that I
17 didn't do it.

18

19 **DC:** And during that time period that you failed to
20 move them, there was no harm done to them, was
21 there?

22

23 **WIT:** He is sitting here safe and sound.

1

2 **DC:** He didn't try to escape during that time frame?

3

4 **WIT:** [The witness shook his head in the negative.]

5

6 **DC:** He didn't try to kill himself during that time

7 frame?

8

9 **WIT:** [The witness shook his head in the negative.]

10 But I--I would only offer, if I can enter the

11 dialog, is that the trial process for him was not

12 really beginning. Now, I will just--really the

13 real answer is that it was my failure. He should

14 have been moved immediately. I failed. I did

15 not execute my responsibilities properly. It

16 should have been done immediately, and there's

17 only one person to blame and it's me.

18

19 **DC:** Thanks, sir. I don't have any further question.

20

21 **Presiding Officer:** Cross-examination?

22

23 **APROS:** Yes, sir. Thank you.

1

2 Good morning, Colonel. Colonel, did you move the
3 accused to retaliate against him for his
4 cooperation with the Commission process?

5

6 **WIT:** Absolutely not.

7

8 **APROS:** And Captain Faulkner asked you about this plan
9 that you had formulated to move all of the
10 Commission detainees to one block. Was, in fact,
11 the accused moved pursuant to that plan?

12

13 **WIT:** Yes.

14

15 **APROS:** If a detainee has an issue regarding his
16 confinement, how does he get it addressed?

17

18 **WIT:** Detainees interact with the guard force routinely
19 and almost daily I deal with issues of status of
20 detention where they're at. That bubbles up from
21 the Sergeant of the Guard to the camp commander
22 to the--one of the two battalion commanders and
23 then to myself. So the process--it's just like

1 following the military chain of command. They
2 inform them and that will bubble up to me. Many
3 times, they are handled at lower--lower tiers,
4 you know, this individual this cell is inop, my
5 toilet's not flushing or this that or the other
6 issue and the block sergeant will call to the
7 detainee operation center and say, "we need to
8 move him" and they will be moved.
9
10 **APROS:** So the Sergeant of the Guard has authority to act
11 on his own if necessary to----
12
13 **WIT:** He must coordinate any movement with the
14 Detention Operation Center. Beyond that, he can
15 move internally with his area of responsibility.
16 Did--did that make sense? I'm not----
17
18 **APROS:** Yes, sir.
19
20 **WIT:** If a block sergeant is running--if he's
21 responsible for Charlie lower and a cell becomes
22 inop, if there's a justifiable reason as to why a
23 detainee should be moved, then he has to just

1 coordinate through the chain of command to the
2 Detention Operation Center and say we need to
3 move so and so and it's done.
4
5 **APROS:** Now, the accused is handicapped. He has an issue
6 with his hand having been amputated. Do you have
7 any other handicapped people in your camp?
8
9 **WIT:** Yes. Yes, we do.
10
11 **APROS:** Do you have any other amputees in your camp?
12
13 **WIT:** Yes, we do.
14
15 **APROS:** Do you know the number?
16
17 **WIT:** It's in the proximity of 22 to 23 individuals.
18
19 **APROS:** If they ever have a problem with any of the
20 conditions of their confinement due to their
21 handicap are--have you helped them in the past?
22

1 **WIT:** We have, absolutely We make modifications. We
2 provide those from the medical department itself.
3 We provide the apparatus necessary to help them
4 in their daily life so accommodations are made
5 fully for any disability.

6

7 **APROS:** Now, the defense has raised the fact that the
8 accused is unable to wash himself in his current
9 cell. Would you agree with that statement?

10

11 **WIT:** He raised that with me in a meeting that we had
12 approximately one month ago.

13

14 **APROS:** The accused did or the defense?

15

16 **WIT:** The defense attorney.

17

18 **APROS:** Okay. And was anything done to remedy that
19 issue?

20

21 **WIT:** The very next morning, I had my engineer and the
22 camp commander move into his cell and we modified
23 the sink such that if you--we made it like the

1 push button you will get a longer running of
2 water.
3
4 **APROS:** Okay. And how long did it take for you to
5 respond to that request?
6
7 **WIT:** Within hours. Very--we concluded our meeting
8 probably 1900 or so. It was my first order of
9 business the very next morning.
10
11 **APROS:** And to your knowledge, has the accused ever asked
12 any of your personnel, prior to hearing it from
13 the defense?
14
15 **WIT:** No. When I--when I spoke to the guard force
16 about it, they were a bit shocked. We were going
17 through the--the modifications in his cell and
18 they said that he was very adept at manipulating
19 the push button sink and able to cleanse himself
20 very adeptly and they said he has never
21 complained about it. They had no complaints
22 whatsoever of him about his cell configuration.
23

1 **APROS:** Now, you also spoke of one individual that has
2 not yet been moved to Camp 5 and I believe at the
3 time the defense wrote their motion there were
4 actually two people that still had not been
5 moved?

6
7 **WIT:** That's correct.

8
9 **APROS:** Okay. But one of those has been moved to Camp 5?

10
11 **WIT:** Yes, sir.

12
13 **APROS:** Okay. Before you moved them, was it your
14 intention to reward those people for not
15 cooperating with the Commission's process?

16
17 **WIT:** Could you say again? I must have missed it.

18
19 **APROS:** Yes, sir. Those two people that hadn't moved to
20 Camp 5, was that done to reward them for not
21 cooperating with the Commission process?

22

1 **WIT:** Oh, no. Absolutely not. In one instance, the
2 individual had to serve additional time in a
3 maximum security cell--additional--he was in
4 Romeo Block. In the other instance, he was in a
5 maximum security cell in Camp 1 and for matters--
6 for matters he has not been moved other matters
7 that, frankly, verge on classified.
8
9 **APROS:** Yes, sir. Getting back to the arrangement right
10 now that the accused has in his cell, regarding
11 the sink. Now, is the sink arrangement in Camp 5
12 any different than it was in Camp 4?
13
14 **WIT:** They are different, but they are push button
15 sinks. In essence, they are the same type sink.
16
17 **APROS:** And when you say, "push button" can you describe
18 to the Presiding Officer what you mean by push
19 button?
20
21 **WIT:** Rather than a handle that you would turn to turn
22 it on it is consistent with most throughout
23 correctional system is a button that you push

1 like at a rest stop along the highway so the water
2 doesn't run forever kind of deal. Push it once
3 for so many seconds and then it stops.
4
5 **APROS:** So, should the accused be able to operate that
6 sink with one good hand?
7
8 **WIT:** Absolutely.
9
10 **APROS:** Now, the defense has also raised the issue that
11 the accused has not often seen the light of day
12 in his recreation since he's been moved to Camp
13 5. Can you explain how--can you explain the
14 schedule for recreation throughout the day at
15 Camp 5?
16
17 **WIT:** Yes. It is--it rotates--it revolves from tier to
18 tier to tier. Each day where they get a
19 different time of day that they are offered their
20 recreation to go out, so it will move and
21 basically as a detainee, he gets 2 hours out
22 there and we normally take tiers out at a time
23 and we go out. It just--you know, you're in a

1 different block throughout the week--a block of
2 time throughout the week.
3
4 **APROS:** And what time does recreation start in Camp 5?
5
6 **WIT:** We start recreation after call to prayer, 0500 it
7 will start, roughly.
8
9 **APROS:** And what time does it end at night?
10
11 **WIT:** Normally secure at 2200.
12
13 **APROS:** And if someone is in a 5 a.m. to 7 a.m. block of
14 recreation at some point, does that mean that
15 they only get to rec from 5 to 7 for the rest of
16 their time in Camp 5?
17
18 **WIT:** Absolutely not. Absolutely not.
19
20 **APROS:** And how often are they moved--they changed, the
21 times?
22
23 **WIT:** Daily it rotates. We rotate everyday.

1

2 **APROS:** And do you know for a fact that the accused has
3 actually recreated in the--or been offered
4 recreation in the daytime since he was moved to
5 Camp 5?

6

7 **WIT:** Yes, absolutely. It is during morning updates,
8 the camp commanders briefing every morning is a
9 particular question since the issue was raised
10 about a month ago really since I moved him in.
11 No actually since the Captain--I had a discussion
12 with him. I made a note that this was a major
13 matter of concern which I specifically asked are
14 they getting daylight recreation, so I confirm
15 that once, two, three times a week that
16 Commission candidates are getting daylight
17 recreation. And it is our--it is our policy that
18 everyone will get more opportunities to rec
19 during the daylight than the night hours. If by
20 the schedule we can't get them out during the
21 daylight if you're on nighttime rec one night,
22 the next day you'll be first in the cue to get
23 daylight rec.

1

2 **APROS:** And when they recreate at Camp 5, are they able
3 to see other Pre-Commission detainees who are
4 recreating?

5

6 **WIT:** Yes, they are. They are in adjacent recreation
7 areas.

8

9 **APROS:** Okay. Can you describe, as best as you can, the
10 size of the recreation area they give them?

11

12 **WIT:** Initially, I was given the exact dimensions.
13 Give me a second. I would say it's roughly about
14 5 yards wide, 10 yards deep for each individual's
15 recreation area.

16

17 **APROS:** Okay. And are the accused--or are the Pre-Trial
18 detainees--or the Pre-Commission detainees able
19 to touch each other during recreation?

20

21 **WIT:** Well, I--for Commission detainees, in particular
22 those that I have greatest threat of, and there's
23 three individuals that I will not let come in

1 contact at all, we house--there are pens between
2 them so to preclude any kind of touching.

3

4 **APROS:** Now, when Mr. Barhoumi was in Camp 4, what was
5 the process that a defense attorney had to go
6 through in order to see him to help prepare his
7 defense?

8

9 **WIT:** The defense process is to contact our staff judge
10 advocate to say that they need to see a detainee
11 and then the staff judge advocate contacts my
12 operations center and we set the meeting up in
13 Camp Echo.

14

15 **APROS:** So the meeting was in Camp Echo. Can you explain
16 why the meetings are typically in Camp Echo?

17

18 **WIT:** In Camp Echo, it affords the counsel and the
19 detainees a degree of privacy that we couldn't
20 really provide elsewhere. It provides us with a
21 degree of security and it is--we have cameras in
22 all of the cells so that we can watch. There is

1 no audio, but we can watch to ensure the safety
2 of both detainee and counsel.
3
4 **APROS:** Now that the accused is in Camp 5, what is the
5 process for the when his defense attorney wants
6 to come and meet with him?
7
8 **WIT:** Contacts SJA--it's the exact same. Contact the
9 SJA. We move him to Camp Echo and they meet at
10 Camp Echo.
11
12 **APROS:** So the conditions of where he meets with his
13 defense attorney are exactly the same as prior to
14 him moving?
15
16 **WIT:** Absolutely.
17
18 **APROS:** Now, is a charged detainee allowed to keep any of
19 his legal matters with him?
20
21 **WIT:** Yes, he is. He has full access to those.
22

1 **APROS:** And in Camp 5, where--where would those matters
2 be kept?
3
4 **WIT:** Well, detainees have a little bin, a plastic
5 Tupperware type box. Their items are stored in
6 that and there are lockers at the end of each
7 tier where their items are stored and so they can
8 request that. They can have their box brought to
9 them to which they can get access to the
10 materials.
11
12 **APROS:** Can they get that at anytime?
13
14 **WIT:** As long as it's not quiet hours, 2200 and past.
15
16 **APROS:** 2200 until when?
17
18 **WIT:** 2200 until call to prayer.
19
20 **APROS:** To call to prayer is quiet----
21
22 **WIT:** That's our general quiet hours to sleep.
23

1 **APROS:** Now, where would an accused have to keep all of
2 his legal matters if he were in Camp 4?
3
4 **WIT:** He would keep them in his plastic bin and it'd be
5 secured under his bed. And frankly, that is a
6 new area of concern of mine of frankly not a huge
7 overly concern a burden on me, but the detainees--
8 all of the materials are subject to being rifled
9 through or gone through by any other detainee in
10 that facility. When you're in Camp 5, their
11 materials are secured.
12
13 **APROS:** So what is the difference in the access to the
14 materials that the accused has in Camp 5 as
15 opposed to when he was in Camp 4?
16
17 **WIT:** Well, in Camp 4, he got it immediately and
18 readily available to him 24/7. In Camp 5, he has
19 to ask the guard to bring it to him. Some
20 materials are left with him. We have a--we also
21 have, if it's a large amount, we have one
22 detainee, and I frank--I just don't know the
23 amount of materials he has. But I know one

1 detainee has a very large amount of legal
2 materials, and so we have to hold it elsewhere
3 and then we take him to a reading room, which we
4 offer to any of them if they want. They can go
5 to that room to read, go through the materials to
6 write, do whatever they need.

7
8 **APROS:** So, his ability to help prepare his defense has
9 not been impacted in anyway from his move from
10 Camp 4 to Camp 5?

11
12 **WIT:** I cannot see how it would be.

13
14 **DC:** Objection, speculation.

15
16 **Presiding Officer:** Overruled.

17
18 **APROS:** When you moved the detainee from Camp 4 to Camp
19 5, was it your intention to interfere with the
20 accused/attorney client relationship?

21
22 **WIT:** Absolutely not. By no means.

23

1 **APROS:** Now that the accused is in Camp 5, is there any
2 more of a time delay for the defense to be able
3 to see their client?

4

5 **WIT:** No. We pre-stage the detainee the night before
6 counsel are to arrive. We would move the
7 detainee to Camp Echo such that he is standing by
8 and available as soon as counsel arrives the next
9 day.

10

11 **APROS:** And--and you testified about Army Regulation 190-
12 47 and Army Regulation 190-8, just to make it
13 clear, those aren't actually binding on your
14 operations at GTMO. They're not written
15 specifically for GTMO operations, are they?

16

17 **WIT:** That is--that's absolutely correct. They,
18 frankly when it comes to Army regulations, they
19 have not yet caught up with the environment in
20 which we work, so I have to take pieces of
21 guidance that are closest to my situation and
22 apply them. So I could be criticized for not
23 following one paragraph or a following of a

1 certain paragraph. It is--it's something that
2 just comes with my job. Somebody could say, you
3 shouldn't follow that paragraph or you should,
4 and I--I get that everyday from everybody.

5
6 **APROS:** The defense touched on why you hadn't moved the
7 accused starting in November of 2004, and I
8 believe you testified that you weren't aware of
9 that but that you were aware of when he was
10 eventually charged--oh, I'm sorry, July 2004, but
11 you were aware of when he was actually charged.
12 Are you aware of when he actually had his first
13 Commission session?

14
15 **WIT:** And to answer that question, no. I--I could be
16 wrong or I could be confused. I certainly would
17 have known it at the time. I would have known
18 that at the time he was having a session for me
19 to recall right now, but as I--I think through
20 his case, his all has been very recent within the
21 last 30 days or so before he's been brought here.

22

1 **APROS:** And in your experience, how adept are the other
2 detainees at communicating news to each other
3 about what might be happening in the camps or at
4 the Commission process?

5

6 **WIT:** Extremely good. They are--it's what's known by
7 the guards as Detainee Information Network.
8 Something in Camp 3 will be throughout Camp 5
9 within 7 days.

10

11 **APROS:** So something as news worthy as someone's trial
12 starting might spread around the camp very
13 quickly?

14

15 **WIT:** Absolutely. Without any doubt it will spread
16 very quickly. That is the most common
17 discussions that they have in the block or that
18 I'm aware of is discussions about the Commission
19 process. Anything is news worthy. They will do
20 their best, and frankly there is a technique that
21 they have to help spread the word. They often
22 times will carry out acts of violence against the
23 guard such that they may get to another camp,

1 i.e. Camp 5 if they get news from Camp 3,
2 somebody will commit an offense so they can go to
3 Camp 3 and the same with Camp 4 if they need to
4 get to the word or they will feign illness to get
5 to the hospital so there's various techniques
6 that they use to try to gain information and pass
7 it amongst the detainees.

8

9 **APROS:** Okay. And when an--and when an individual is
10 finally charged, is it a policy of your
11 organization to announce that to everyone in the
12 camp?

13

14 **WIT:** No. It is not.

15

16 **APROS:** So the only way that information would get out is
17 if the accused would tell somebody?

18

19 **WIT:** Absolutely. Well, there are other techniques.
20 Information comes into the camps in various
21 means, so the detainee himself could say it or
22 other--other means in which information gets into
23 the camps.

1

2 **APROS:** But it certainly not the policy of any of your
3 people to announce that to everyone?

4

5 **WIT:** Absolutely not.

6

7 **APROS:** What privileges did the accused have at Camp 4
8 that he doesn't have at Camp 5?

9

10 **WIT:** The greatest--there are two thing. I mean one,
11 he had much greater freedom of movement. He had
12 much longer recreation periods at Camp 4 and he
13 was--in that, was able to commune with his fellow
14 detainees to where he would be side by side
15 during prayer and take meals together. Mealtime
16 at Camp 4 is much like a, easiest way, it's like
17 a family picnic, you know, when you're outside,
18 foods brought to you, you serve it up like a
19 buffet style, and they eat collectively. Again
20 more of that envisioned by the 3rd Geneva
21 Convention.

22

1 **APROS:** Any comforts items he may have had at Camp 4 that
2 he retained with him when he went to Camp 5?
3
4 **WIT:** Comfort items do not change in compliance status.
5
6 **APROS:** Are you familiar with the term "incommunicado"?
7
8 **WIT:** Yes, I am.
9
10 **APROS:** Is it fair to say that the accused is being held
11 in an incommunicado status?
12
13 **WIT:** Absolutely not. He is--he has the ability to
14 speak with counsel be it habeas or Commission at
15 whatever time the lawyers present themselves
16 through an agreement with the SJA. He has the
17 ability to write letters. He has the ability to
18 write ICRC, International Commission Red Cross,
19 messages. He is seen by the International
20 Commission Red Cross, so he is able to
21 communicate through various means external to the
22 camp.
23

1 **APROS:** Now, Colonel, based on your 24 years of
2 experience, do you believe that the accused is
3 being treated in a humane fashion?
4
5 **WIT:** Absolutely. No if, ands, or buts.
6
7 **APROS:** No further questions, sir.
8
9 **Presiding Officer:** Redirect?
10
11 **DC:** Sir, some of the questions from the government,
12 you mentioned that there's still one detainee
13 that's not at Camp 5 and that you do plan to move
14 him over to Camp 5?
15
16 **WIT:** Yes.
17
18 **DC:** Why is he--is he at Camp 1?
19
20 **WIT:** Yes.
21
22 **DC:** Why?
23

1 **WIT:** He's in the----

2

3 **APROS:** Objection, relevance. He's asked and answered

4 this question. He's also said he's gotten close

5 to classified information on this.

6

7 **Presiding Officer:** Captain Faulkner, what's the relevance

8 of the reason why that individual is not in Camp

9 5?

10

11 **DC:** Sir, I think they--I think they opened the door

12 to it when they went into the fact that they've

13 left--that there's still one guy at Camp 5 and

14 it's not apparent to me exactly why he's still

15 there. And if we need to close the session, we

16 can close the session, but it certainly goes to

17 his assertion that they all need to be in one

18 location together.

19

20 **Presiding Officer:** Well, hold on just a sec.

21

22 [Long pause.]

23

1 **Presiding Officer:** He's already answered that question.
2 Please, move on.
3
4 **DC:** You said that you now get daily updates about the
5 rec time that the Pre-Commission detainees are
6 receiving, so was it--was it the procedure before
7 I made my complaints to you that they were only
8 given these 2 hours of rec time early in the
9 morning?
10
11 **WIT:** No. I just made it more of a matter of my
12 visibility over the issue to--to ensure----
13
14 **DC:** Do you know--do you know what their rec time was
15 before I made my complaint to you?
16
17 **WIT:** It was during the--when you said 5 to 7, he was
18 doing 5 to 7.
19
20 **DC:** Everyday?
21
22 **WIT:** I can't give you an honest--I can't answer it. I
23 don't know that for sure.

1

2 **DC:** How much time do you spend at Camp 5, sir?

3

4 **WIT:** Probably, it's very hard to--I'm--I do not live
5 in Camp 5. I don't really stay there. My office
6 is in Camp 1. I visit three or four times a week
7 sometimes it's more, sometimes it's less.

8

9 **DC:** Most of what you know about Camp 5 and the daily
10 operations are what's being told to you by
11 others?

12

13 **WIT:** No. I set the policy. I mean I established the
14 rules by which it runs. It's through personal
15 observation. It is in large part through what is
16 communicated to me. The daily--I--I, you know, I
17 can't be in all the camps, so I have to rely on
18 the reports back from the camps and I monitor
19 that activity through my headquarters through
20 daily reports but also through a great deal of
21 just walking around.

22

1 **DC:** Are all of the detainees at Camp 5 offered this
2 recreation time everyday?
3
4 **WIT:** Absolutely. Everyone's offered rec everyday.
5
6 **DC:** How do you know?
7
8 **WIT:** Well, unless I have sergeants and colonels who
9 lie to me, they all tell me that and then, I
10 mean, that is the standing rule.
11
12 **DC:** Who--who offers the recreation time?
13
14 **WIT:** The block NCO.
15
16 **DC:** And you mentioned other colonels, are there other
17 colonels that are constantly at Camp 5?
18
19 **WIT:** There's a lieutenant colonel that is responsible
20 directly for Camp 5 and Camp Echo, so his scope
21 of operations is much smaller than what I have to
22 contend with, so he spends a lot more time in
23 Camp 5 than I.

1

2 **DC:** If all of the detainees were to accept their
3 recreation time, there would be no way to give
4 them all 2 hours or even 1 hour a day, would
5 there, at Camp 5?

6

7 **WIT:** If--if we ever ran into that, I would expand the
8 hours. I am--you can--I mean this is not--this
9 has been my personal initiative, one of those
10 things, again, it's just to where I go to safe
11 and to secure custody and improve the quality of
12 life. I have made it one of my driving forces to
13 get them the 2 hours. When I took command, they
14 were only getting 30 minutes--30 minutes and I
15 don't know if it was everyday of the week.

16

17 **DC:** In response to some of the prosecution's
18 questions you answered that Mr. Barhoumi has
19 essentially the same access to me and the same
20 ability to assist in this case.

21

22 **WIT:** Yes.

23

1 **DC:** Do you understand that Mr. Barhoumi might
2 understandably be upset that he was moved from
3 Camp 5 to Camp 4?
4
5 **APROS:** Objection, calls for----
6
7 **DC:** Or excuse me, from 4 to 5.
8
9 **APROS:** ----speculation and is----
10
11 **Presiding Officer:** I'm sorry. Finish your question.
12
13 **DC:** That he might be upset about his move from Camp 4
14 to Camp 5.
15
16 **Presiding Officer:** And the objection is?
17
18 **APROS:** My objection's twofold, one, it calls for
19 speculation on the part of the Colonel to figure
20 out whether or not the accused is upset about
21 something and two, the accused being upset about
22 something is really irrelevant to any legal issue
23 before you in the motion, sir.

1

2 **Presiding Officer:** Well, Captain Faulkner.

3

4 **DC:** It goes--sir, whether or not he's upset goes to
5 the very impact on the attorney/client
6 relationship that's the basis of our motion and
7 the Colonel has expressed that he's familiar with
8 camp operations what one camp is like versus
9 another camp. I think he has it within his
10 knowledge to know whether or not somebody might
11 be upset about moving from Camp 4 to Camp 5.

12

13 **Presiding Officer:** Well, I believe your question was, "did
14 he understand someone might reasonably be upset,"
15 I don't find that speculative and I do find that
16 it is at least one potential impact for the move.
17 I'll overrule the objection and allow the
18 question.

19

20 **APROS:** Yes, sir.

21

22 **Presiding Officer:** You may answer.

23

1 **WIT:** Detainees are upset of me for any kind of move.
2 Would he be reasonably upset, he could well be.
3 Another one would not be.

4

5 **DC:** And you understand that if he is upset--if--if--
6 if he participates in a Commission proceeding and
7 you--and you admitted that you didn't move him
8 until his proceedings kind of started. He
9 participates in a Commission proceeding and days
10 later or a few weeks later he's moved from 4 to 5
11 and upset about that. Do you not see that that
12 could have an impact on the attorney/client
13 relationship?

14

15 **WIT:** I frankly don't because it's a strong position of
16 mine that custodial operations consistent what I
17 understand, I'm not a lawyer, but consistent with
18 everything I know from the corrections world and
19 I have studied corrections in my education is
20 that custodial matters are handled and are
21 separate from judicial matters. Courts can
22 intervene and so he should not make a distinction
23 of how I run my camp and how I run that camp is

1 more under the executive realm has anything to do
2 with judicial matters. If he does not understand
3 that, then I would think it would be incumbent on
4 counsel to explain to him that you have nothing
5 to do with me and I have nothing to do with you.

6

7 **DC:** But do you understand how--how a detainee might
8 think that?

9

10 **WIT:** No, I do not understand how a detainee
11 understands if someone explains to him what it
12 is. He knows me. He knows me. Just as every
13 other detainee out there knows, they know I do
14 not lie. They know--I have never lied to a
15 detainee and if I tell him, and he can look at me
16 now if he would like, I would tell him now you
17 have nothing to do with this. It is not your
18 decision. I did not consult with you. I
19 consulted with no one external to the Joint Task
20 Force. It is strictly a decision I made based on
21 his safety and his security. And he knows I'm
22 sincere in that.

23

1 **DC:** Did you consider consulting with me?

2

3 **WIT:** No, I did not. I did not see it appropriate. No
4 correctional facility in the United States
5 consults with attorneys before they make moves of
6 detainees or inmates. I have done a wide search.
7 I was actually laughed at by correctional people
8 when they said they consulted with attorneys
9 prior to moving their inmates.

10

11 **DC:** Did you consider telling the defense attorneys
12 for the detainees who were being moved prior to
13 the move?

14

15 **WIT:** I did not because I did not see that it
16 concerned----

17

18 **DC:** You didn't see it as a concern or you didn't
19 think it was germane to the issue of moving?

20

21 **WIT:** Germane. I did not see it as germane. I did not
22 also see it as appropriate that I would consult
23 with you in any manner about that.

1

2 **DC:** Were the detainees told in any advance--were they
3 given any advance notice that they were being
4 moved?

5

6 **WIT:** We do not give detainees any advance notice on
7 moves.

8

9 **DC:** Were they told why they were being moved?

10

11 **WIT:** We normally do not tell detainees why they are
12 being moved.

13

14 **DC:** So if Mr. Barhoumi's move from 4 to 5, his
15 attorney's never been told and he's not being
16 told why he's being moved, do you understand that
17 he could view that as punishment? He's being
18 moved from the camp where he's worked so hard to
19 be, abiding by the rules, and now he's being
20 moved to Camp 5. Do you not see that he might
21 see that as punishment?

22

1 **WIT:** There is a large "if" there. If he did not
2 recognize that everybody on his tier is not a
3 Commission's candidate, within a matter of
4 minutes I would speculate that everyone there
5 came to the quick conclusion that we're all here
6 for one reason. The detainees are much smarter
7 than anyone wants to give them credit for.
8 They're IQ goes far beyond mine, I think.
9
10 **DC:** But--but all of the Commission detainees weren't
11 there, were they?
12
13 **WIT:** On the tier that he was moved to, only Commission
14 detainees were there.
15
16 **DC:** But not all of them?
17
18 **WIT:** All but the ones that we have spoken about
19 previously.
20
21 **DC:** But--and--and the detainees were not told here's
22 why the other two aren't here?
23

1 **WIT:** We--we don't really exchange that type of
2 information with detainees.

3

4 **DC:** You said that you moved him and--and part of it
5 was that you had overlooked it and--and you
6 hadn't moved him sooner----

7

8 **APROS:** Objection, sir. We're way outside of the scope
9 of my cross.

10

11 **Presiding Officer:** Captain, you are straying back into
12 your direct rather than responding to cross-
13 examination. Let me ask you to tighten up your
14 questions.

15

16 **DC:** Yes, sir. Sir, the government did ask a question
17 about when he actually became aware of the
18 proceedings. I'd like to explore that just a
19 little bit.

20

21 **Presiding Officer:** Very well.

22

1 **DC:** You said that Mr. Barhoumi's proceedings you
2 came--you became aware of once they started a
3 relatively short time ago?
4
5 **WIT:** [The witness nodded his head in the affirmative.]
6
7 **DC:** One of the other detainees, Khadr, was in Camp 4?
8
9 **WIT:** Yes.
10
11 **DC:** And are you aware that he had a proceeding the
12 week of 10 January?
13
14 **WIT:** I am.
15
16 **DC:** And yet he wasn't moved from Camp 4 to Camp 5
17 until the end of March?
18
19 **WIT:** That's correct.
20
21 **DC:** Is--is there--was--was his safety ever in
22 question during the time period that he wasn't
23 moved?

1

2 **WIT:** At that time frame, in my opinion, he was under
3 general threat and should have been moved.

4

5 **DC:** And why wasn't he?

6

7 **WIT:** My move of him to Camp 5 was, at that time, I was
8 told to wait.

9

10 **DC:** You were going to move him?

11

12 **WIT:** I wanted to move him.

13

14 **DC:** And you were told to wait by whom?

15

16 **WIT:** By the Commanding General.

17

18 **DC:** Why?

19

20 **WIT:** I can't speculate as to the reason.

21

22 **DC:** So--and when was that that you wanted to move
23 him?

1

2 **WIT:** In Khadr's instance, soon--in his instance as
3 soon as I became aware, and I can't put the date
4 to it, I wanted to move him immediately because
5 he was in a minimum security facility. My
6 concern, at that point, was he was in a minimum
7 security facility on trial--going before trial
8 for a serious felony which would require being
9 placed in maximum security.

10

11 **DC:** But why wasn't he moved?

12

13 **WIT:** I can't speculate. I was told let's do not move
14 him.

15

16 **DC:** And do you recall--was it sometime after his
17 hearing?

18

19 **WIT:** The discussion about his placement in camps went
20 on for a period of time from the day of his
21 arrival all the way up. He was always a point of
22 contention between me and my superior.

23

1 **DC:** So you knew that there was a hearing in Khadr.
2 You wanted to move him and somebody said, "no"?
3
4 **WIT:** That's correct.
5
6 **DC:** And at--at that time, were you not aware that
7 there were other hearings going on? Were you not
8 aware that Mr. Barhoumi was scheduled for
9 hearings and that you could have moved him
10 earlier as well?
11
12 **WIT:** In my recollection, I don't--I can't--can't put
13 the date of which I became aware of Mr.
14 Barhoumi's being a Commission's candidate. I
15 wish I could, but I can't put when that came to
16 my knowledge. I--I only ask that you understand
17 I deal with close to 500 of them and I deal with
18 issues every 10 seconds and it's very difficult
19 for me to put them all and get them organized in
20 my mind correctly.
21
22 **DC:** If--if the movement was so important--if this
23 movement of Pre-Commissions--if this

1 consolidation of Pre-Commissions is so important,
2 why did it take that long to get it done? Why--
3 why--I guess let me ask that question first.
4
5 **WIT:** Could you just restate what the----
6
7 **DC:** Why did it take that long--why did it take so
8 long to get it done if--if this is such an
9 important safety issue?
10
11 **WIT:** Again, it's my failure to get them all
12 consolidated and put into one place. That was my
13 failure for not--for not having done it.
14
15 **DC:** Do--do you control the movement of detainees
16 between camps?
17
18 **WIT:** I do but they can be vetoed, so at the end, am I
19 the ultimate decision maker on it? The
20 Commanding General can reach down and stop--stop
21 anything that I do.
22
23 **DC:** Is the Commanding General a correction officer?

1

2 **WIT:** No. He is not.

3

4 **DC:** Do you know what branch he is?

5

6 **WIT:** He's--he was an artillery officer.

7

8 **DC:** He was artillery and the current?

9

10 **WIT:** He is a Navy Admiral.

11

12 **DC:** And do you know what his branch or----

13

14 **WIT:** No. He's an aviator.

15

16 **DC:** Thanks, sir. I don't have any further questions.

17

18 **Presiding Officer:** Any recross?

19

20 **APROS:** No, sir.

21

22 **Presiding Officer:** Very well. Is this witness subject to

23 recall?

1

2 **APROS:** Not from the government, sir.

3

4 **DC:** I'd like him temporarily excused, sir.

5

6 **Presiding Officer:** Very well. Colonel, I'm going to allow
7 you to step down. Please, do not discuss your
8 testimony with anyone outside the courtroom other
9 than counsel----

10

11 **WIT:** Yes, sir.

12

13 **Presiding Officer:** ----pending your potential recall.

14

15 **WIT:** Yes, sir.

16

17 **Presiding Officer:** You may step down. Thank you for your
18 testimony.

19

20 [The witness withdrew from the courtroom.]

21

22 **Presiding Officer:** Captain Faulkner, did you have
23 additional evidence you'd like to present?

1

2 **DC:** Yes, sir. The defense calls Mr. Barhoumi.

3

4 **Presiding Officer:** How long do you expect this examination
5 will take?

6

7 **DC:** I think--I think a break would probably be
8 appropriate, sir.

9

10 **Presiding Officer:** Should we break for lunch?

11

12 **DC:** That's probably a good idea, sir.

13

14 **Presiding Officer:** Does the prosecution concur?

15

16 **APROS:** Yes, sir.

17

18 **Presiding Officer:** Very well. The Commission will be in
19 recess for lunch. We'll reconvene at 1300.

20

21 **DC:** 1300, sir?

22

23 **Presiding Officer:** Yes. The Commission's in recess.

1

2 *The Commission Hearing recessed at 1134, 26 April 2006.*

3

4 *The Commission Hearing was called to order at 1328, 26*

5 *April 2006.*

6

7 **Presiding Officer:** This Commission will come to order.

8

9 **APROS:** All parties present when the Commission recessed

10 are again present.

11

12 **Presiding Officer:** Captain Faulkner, you may proceed.

13

14 **DC:** Sir, the defense calls Mr. Barhoumi.

15

16 **Presiding Officer:** Very well.

17

18 **The accused was called as a witness for the defense, was**

19 **sworn, and testified as follows:**

20

21 **DC:** Mr. Barhoumi, how long have you been here at

22 Guantanamo?

23

1 **ACC:** Almost 4 years.

2

3 **DC:** And in that time, have you have been detained at

4 Camp 4?

5

6 **ACC:** I don't understand the question.

7

8 **DC:** Have you ever lived at Camp 4?

9

10 **ACC:** Yes, I did.

11

12 **DC:** How long did you live at Camp 4?

13

14 **ACC:** Almost a year, maybe less than a year.

15

16 **DC:** And were you moved to Camp 5 approximately 1

17 month ago?

18

19 **ACC:** Yes.

20

21 **DC:** Prior to moving to Camp 5, did you cause any

22 problems at Camp 4?

23

1 **ACC:** No, no, not at all.

2

3 **DC:** Were you threatened in any way at Camp 4?

4

5 **ACC:** No, I was not subjected to any threat.

6

7 **DC:** Did you ever try to escape from Camp 4?

8

9 **ACC:** No, I did not try to escape.

10

11 **DC:** Did you ever try to hurt yourself or take your

12 own life at Camp 4?

13

14 **ACC:** No, not at all.

15

16 **DC:** When you were moved to Camp 5, did anybody inform

17 you of the reason for your movement?

18

19 **ACC:** No, they did not give me any idea. They came to

20 me. All of a sudden they asked me to pack my

21 things. I asked why but I got no response.

22

23 **DC:** Did they allow you to pack all of your things?

1

2 **ACC:** I did not pack fully. I did leave some of my
3 things over there.
4

5 **DC:** Have you ever gotten any of those things that you
6 left at Camp 4 delivered to you at Camp 5?
7

8 **ACC:** No, no, they did not.
9

10 **DC:** What did you think when you were being moved to
11 Camp 5?
12

13 **ACC:** I thought I was punished.
14

15 **DC:** Why did you think that?
16

17 **ACC:** Because Camp 5 is known for being punishment
18 place. Everybody knows that.
19

20 **DC:** What are the differences at Camp 5 than Camp 4
21 that make living more difficult for you?
22

1 **ACC:** There is a huge difference between Camp 4 and
2 Camp 5. There are many privileges in Camp 4.
3 You have a lot more freedom and this has an
4 impact on your physical condition as well as your
5 psychological condition.
6
7 **DC:** Has your physical condition deteriorated since
8 you went to Camp 5?
9
10 **ACC:** Yes, it deteriorated a lot.
11
12 **DC:** In what way?
13
14 **ACC:** I find things more difficult. My--I want to show
15 you my hand. I find it very difficult to use the
16 toilet. It is different than that in Camp 4
17 because this one is--I have to push the button
18 and when I use--when I go to the bathroom and I
19 use the toilet, there is no other way except
20 using this hand because I use the other hand for
21 cleanliness.
22

1 And the other thing is that my hand is weak. The
2 nerves is, the skin is weak, my bones, my bones
3 hurt every time I use my hand--my finger to push
4 the button it hurts and it causes me a lot of
5 pain and I wound myself.

6
7 The other thing is the air condition. The cold
8 does affect my hand. If somebody was to touch my
9 hand, this hand and the other hand, you will find
10 that there is a great difference. This hand is
11 much more colder and this will affect my nerves
12 and it causes me a lot of pain.

13
14 And excuse me for talking and discussing this but
15 when I do go to the toilet, I have to use water
16 for cleanliness and I have to use water on the
17 inside rather on the outside and sometime I just
18 don't eat because I don't want to use the
19 bathroom.

20
21 **DC:** And when you say, "water on the inside," you mean
22 from the inside of the toilet?

23

1 **ACC:** Yes, inside the toilet.

2

3 **DC:** What about the sink at Camp 5, is it also the

4 kind where you push a button?

5

6 **ACC:** Yes, it is all through pushing a button, whether

7 it was the sink or using the faucet and it is

8 very difficult to use because it is not like easy

9 to use.

10

11 **DC:** Is the button on Camp 5 more difficult to push

12 than the button on the faucets at Camp 4?

13

14 **ACC:** There is a huge difference because at Camp 4

15 there are just regular faucets; you just push and

16 it is very easy to use.

17

18 **DC:** If you experienced any problems at Camp 4, did

19 you have any friends that could help you out at

20 Camp 4 with using the faucets?

21

1 **ACC:** Yes, they used to help me a lot. They used to
2 help me wash my clothes as well as other things.
3 They were always there to help me.

4

5 **DC:** Mr. Barhoumi, how has the move to Camp 5 affected
6 your relationship with me?

7

8 **ACC:** I was really surprised by the move. I was not
9 expecting it and it was so contradictory because
10 I did have a good relationship. I use to talk to
11 him. I was with him. They never mentioned
12 anything. And once I moved I had already started
13 to get some trust with my attorney, however, with
14 this move, I did start to lose this trust with my
15 attorney because I did not know what was going on
16 and I did not expect it.

17

18 **DC:** Thank you, Mr. Barhoumi I don't have any further
19 questions for you but the prosecution may have
20 some questions for you.

21

22 **Presiding Officer:** The prosecution may cross-examine.

23

1 **APROS:** Thank you, sir.

2

3 Mr. Barhoumi, you have allowed your defense

4 counsel to file this motion on your behalf,

5 correct?

6

7 **ACC:** Yes, I did. I asked him to do that on my behalf

8 because I felt that he understood me and I

9 explained what was going on with me and I asked

10 him to file it on my behalf.

11

12 **APROS:** So you had many conversations with him leading up

13 to this motion?

14

15 **ACC:** Yes.

16

17 **APROS:** And you heard the colonel testify today, and your

18 defense counsel asked him many questions?

19

20 **ACC:** Yes, I head him but there were a lot of things

21 that I could have talked about as well.

22

1 **APROS:** And you prepared for your testimony today with
2 your defense counsel, correct?
3
4 **ACC:** Yes.
5
6 **APROS:** So you were able to work with him in putting
7 forth this legal motion?
8
9 **ACC:** Yes, and I have cooperated with him since the
10 beginning since I have a problem and I have
11 explained it to him and I gave him a chance to
12 try to help me out.
13
14 **APROS:** And he did try to help you out today, correct?
15
16 **ACC:** Yes, he did try to help me, but I am still
17 waiting for the outcome.
18
19 **APROS:** And he met with you many times in Camp Echo prior
20 to today?
21
22 **ACC:** Yes, I think it was once or twice.
23

1 **APROS:** So when he was down here, he was able to see you
2 and talk to you about your case?
3
4 **ACC:** Yes, he did and we were both surprised about the
5 move and he asked me to give him a chance so he
6 can prove to me that he can help me and that he
7 didn't know about the move either.
8
9 **APROS:** So your ability to prepare for your case today
10 wasn't impacted at all by your move to Camp 5,
11 correct?
12
13 **ACC:** Of course it was affected. This problem would
14 not have existed today if it weren't for the
15 move. The captain, although he is trying to help
16 me, does not feel what I am feeling because it is
17 my hand and it my pain.
18
19 **APROS:** And we will get to your hand in a second, I just
20 want to make sure that in no way, your ability to
21 prepare for trial was affected by your move?
22
23 **ACC:** Yes, this is obvious.

1

2 **APROS:** You had mentioned that you had left some things
3 over at Camp 4 when you were moved?

4

5 **ACC:** Yes.

6

7 **APROS:** What did you leave over there?

8

9 **ACC:** I left several stuff there such as clothes, and
10 documents, and stuff to clean with. Stuff like
11 that, different things.

12

13 **APROS:** Did you ever ask the staff at Camp 5 if you could
14 have that stuff back?

15

16 **ACC:** I have tried asking them for smaller requests
17 than that but they don't care and there is no
18 chance for me to try to approach them and ask
19 them for things. They have not resolved even
20 smaller issues.

21

1 **APROS:** Okay, that wasn't my question. My question was
2 did you ask them specifically for the stuff that
3 you left?
4
5 **ACC:** Yes, I did.
6
7 **APROS:** Now, you said you had no idea when you were moved
8 why you were moved.
9
10 **ACC:** Yes, that is correct. I didn't have any idea and
11 I asked them and they did not respond.
12
13 **APROS:** But you were able to communicate with other
14 people on your block in Camp 5--other detainees,
15 correct?
16
17 **ACC:** It is very hard to communicate. There is only a
18 small area in the door where you can talk to
19 other detainees and I talk very little as well.
20 You can review all the reports and ask the
21 guards, I speak very little and it's hard to
22 communicate with other detainees.
23

1 **APROS:** But you could have talked to them if you wanted
2 to, right?
3
4 **ACC:** The conditions does not encourage anybody to
5 speak because the air condition is loud and you
6 need to speak very loud in order to be heard and
7 it will hurt your throat and it's just not
8 convenient.
9
10 **APROS:** Well, isn't the call to prayer lead by one of the
11 people on the block for everyone to pray?
12
13 **ACC:** Yes. When they open the little window it's time
14 for prayer. Not to all people just for the Imam
15 and the Mu'azen.
16
17 **APROS:** And you have no problem hearing them?
18
19 **ACC:** It's--it's not that easy.
20
21 **APROS:** You discussed your recreation time and how you
22 were in better physical shape at Camp 4 than at
23 Camp 5. Is that correct?

1

2 **ACC:** Yes. It is correct.

3

4 **APROS:** What type of recreation did you do at Camp 4?

5

6 **ACC:** I did a lot of recreational activities. I was
7 outside, of course inside in the fence, and I
8 had--I got a lot of sun. There was also the air
9 conditioning which helped keep me healthy and I
10 had a lot of freedom of movement and I was--which
11 also allowed me to be relaxed and to be able to
12 think of my case and think of different things.

13

14 **APROS:** You have 2 hours of recreation at Camp 5 now if
15 you want it, right?

16

17 **ACC:** Yes.

18

19 **APROS:** And do you always take all 2 hours?

20

21 **ACC:** Sometimes I do depending on the guards and what
22 time they bring me out because sometimes they
23 bring me out at night.

1

2 **APROS:** I'm sorry, I didn't hear that last part, sir.

3 That last line, I didn't hear. The last line
4 from the translation I didn't hear.

5

6 **Presiding Officer:** Would the translator, please, repeat
7 the last response?

8

9 **Translator:** I go outside sometimes for a couple of hours
10 but sometimes they bring me out at night.

11

12 **ACC:** Most of the time they used to take me out at
13 night not during the daytime.

14

15 **APROS:** But you're free to exercise at night there,
16 correct?

17

18 **ACC:** I don't exercise. I have a poor health and
19 physical condition. I can't even eat sometimes
20 so I can't think of that even.

21

22 **APROS:** So then you haven't lost the ability to exercise
23 from the move to Camp 4 from Camp 5?

1

2 **ACC:** I can't. It is cold and due to the conditions
3 that I have explained to your previously I have
4 very poor condition and I have a tough case. I
5 can't do it.

6

7 **APROS:** You mentioned that your hand sometimes gets cold
8 and it causes you pain.

9

10 **ACC:** [Holding up his left hand and showing it.]

11

12 **APROS:** Let the record reflect that the accused is
13 pointing to his damaged hand and where the two
14 knuckles are.

15

16 **ACC:** My hand is not sometimes cold. It is always
17 cold. If you touch it right now and touch the
18 other hand, you will feel that the temperature on
19 that is colder because of the nerves and the bone
20 damage. It is always cold and it hurts me. Even
21 you can see the scars and the wounds on my hands
22 right now. Every time I touch it, I use it, it
23 is so sensitive that I wound myself.

1

2 **APROS:** Have you ever asked to go to the doctor to have
3 your hand checked?

4

5 **ACC:** I see the doctor previously and I seen a lot of
6 doctors before. The only thing that can help is
7 being in normal conditions, being in the sun,
8 being in normal conditions, and sometimes using
9 cream on my hand to be able to help the--relieve
10 the pain.

11

12 **APROS:** Have you ever asked for any cream?

13

14 **ACC:** I did and they did give me a cream--a cream to
15 use; however, it is not really helping because my
16 problem is much bigger than that.

17

18 **APROS:** Have you ever asked for anything to keep your
19 hand warm, to wrap it in to keep it warm? I saw
20 that you were wearing something on your hand when
21 you came up here today. Does that keep your hand
22 warm?

23

1 **ACC:** [Holding up the bandage that is covering his
2 hand.] I will go ahead and explain the medical
3 matter to you right now, exactly what the problem
4 with my hand is and that's what the doctors have
5 told me. Some of the numbness in my hand, I have
6 no feeling in that hand because the blood does
7 not circulate properly. Part of my hand also has
8 a lot of allergies in it where the blood does
9 circulate, but whatever it is, it will always be
10 cold whether the weather outside is hot or cold,
11 my hand, because the blood does not circulate, my
12 hand will always cause a problem.

13
14 **APROS:** So you're hands going to hurt you regardless of
15 whether or not you're in Camp 4 or Camp 5,
16 correct?

17
18 **ACC:** In Camp 4, I didn't have the problem of pushing
19 so hard on my hand, and therefore I was using it
20 less. In Camp 5, I have the problem that I need
21 to use it and push hard on it and also this
22 creates a problem for me. Everybody knows that
23 most of the sick people or people who are having

1 health problems they take to Camp 4 because it is
2 easier to be and--and also because of the sun.
3 When the sun is out there, I have my hand out in
4 the sun. It doesn't create that big of a problem
5 for me.
6
7 **APROS:** But during your rec time at Camp 5, if it's
8 during the day, you can get up to 2 hours of
9 sunshine a day, correct?
10
11 **ACC:** That is correct. But I have a question for you.
12 Out of 24 hours a day, I only get 2 hours outside
13 in the sun. The rest of the time I am sitting in
14 my room and the air condition is too cold. You
15 see my hands right now. You tell me how would--
16 do you know what I feel like with only 2 hours in
17 the sun and the rest of the time I am in my room
18 inside the cold--inside in cold air condition?
19
20 **APROS:** While I would like to engage in a conversation,
21 I'm going to ask the questions, okay, and you're
22 going to answer. If you wore gloves on your
23 hands, would that help your condition in Camp 5?

1

2 **ACC:** It is too cold. It does not help. I am wearing
3 it right now and it does not help.
4

5 **APROS:** Have you ever asked for a heavier warmer glove?
6

7 **ACC:** [Putting his bandage back on his hand.] Yes,
8 I've previously asked, but nothing.
9

10 **APROS:** Do you recall when you asked?
11

12 **ACC:** I don't remember. It was a while ago.
13

14 **APROS:** Now the toilets in Camp 4 also had a push button,
15 correct?
16

17 **ACC:** Yes, there is a button, but it is quite different
18 from the other one. This one is easier to push
19 and if you push it, the water will continuously
20 run for a short period of time. The other one
21 you need to push harder on and it's quite
22 different. As for the toilet, excuse me, for
23 mentioning that, but it's also easier. The other

1 one is on the ground while the one at Camp 5 is
2 higher and tougher to use.

3

4 **APROS:** Did you ever ask any of the guards to make it
5 easier for you to flush the toilet?

6

7 **ACC:** Yes. I did.

8

9 **APROS:** And last month after your attorney raised it with
10 the Colonel, who testified today, isn't it true
11 that it was fixed within a few hours and that it
12 could--and that the water would stay on longer?

13

14 **ACC:** Yes. It is true they did come to fix it, but it
15 was the same--it's still the same. It's still
16 the same sink. It's still the same toilet.

17 There is no difference.

18

19 **APROS:** You mentioned that when you went to Camp 5, you
20 felt you were being punished, and you heard the
21 Colonel testify today that the reasons that you
22 were moved were for security.

23

1 **ACC:** I've been here for 4 years and for 4 years I've
2 lived in different places and I almost--I lived
3 for almost a year in Camp 4. There is no secrets
4 here. I never created any problems. There was
5 never any problems. I thought that it was a
6 punishment because I was operating for--with the
7 Military Commission I was cooperating with them
8 and I was talking to them. I didn't know what
9 was going on.

10

11 **APROS:** So, you thought it was because of your
12 cooperation, but actually now, are you convinced
13 that it was for your security that that's why JTF
14 moved you?

15

16 **ACC:** My stand is still the same. Camp 5 is a place
17 for punishment and I am being punished right now.
18 Everybody knows that Camp 5 is the punishment
19 place. They used to threaten us that if you
20 disobeyed or you did something wrong, you will be
21 taken to Camp 5.

22

23 **APROS:** Do you believe that the Colonel today was lying?

1

2 **ACC:** I did not say, "lying". I never said the word
3 "lying". This is fact. I am basing my words and
4 my statement on facts. If you go there yourself,
5 you will notice what I'm talking about. You can
6 ask the officials. You can ask anyone. This is
7 a fact. I don't know anything about the Colonel
8 if he's lying or not lying. I'm just saying I'm
9 basing what I'm telling you right now on fact and
10 everyone knows that.

11

12 **APROS:** During the last session, you authorized your
13 defense counsel to tell the press that you were
14 born with your hand deformity. Is that true?

15

16 **ACC:** Whatever the attorney said, these are private
17 things related to me that I would not like to
18 discuss.

19

20 **APROS:** Well, while I understand some things you tell the
21 attorney are private, if you authorize him to say
22 it to the press, it is no longer private. So I

1 ask you again, did you authorize him to say that
2 you were born with your hand deformity?
3
4 **ACC:** Yes, of course, I authorized him. Every time he
5 takes a step, he comes and consults with me and
6 there's always discussions between us.
7
8 **APROS:** Do you remember going to your Combatant Status
9 Review Tribunal?
10
11 **ACC:** Yes. It was either in 2003 or the beginning of
12 2004. I don't recall the exact dates.
13
14 **APROS:** Do you remember telling the Combatant Status
15 Review Tribunal that your hand was blown off by a
16 landmine in Afghanistan?
17
18 **ACC:** Yes, I did discuss my hand, but I don't
19 understand the relevance of this. Why are we
20 bringing my--the reason of my hand being like
21 that into the conversation right now.
22

1 **APROS:** Please, just answer the question. Do you
2 remember telling them that your hand was blown
3 off by a landmine in Afghanistan?
4
5 **ACC:** Yes, I did tell them several things. I did.
6
7 **APROS:** And was that one of them?
8
9 **ACC:** Yes, but I have motives to tell them that.
10
11 **APROS:** But were you telling them the truth?
12
13 **ACC:** Yes, I have always said the truth. You can
14 review my statements since I came here 4 years
15 ago and everything is consistent. Everything is
16 the truth.
17
18 **APROS:** Well how is it the truth that you told them that
19 your hand was blown off by a landmine in
20 Afghanistan and it is also the truth that you
21 told your defense counsel to tell the press that
22 you were born with your hand deformity? They
23 both can't be the truth, can they?

1

2 **ACC:** I have authorized my attorney to say whatever I
3 thought was best for me and whatever he thinks is
4 best for me and until today, they keep telling me
5 they have a lot of evidence that is classified
6 against me that I have not yet seen. I don't
7 know what is going on.

8

9 **APROS:** But that is not the question. The question I
10 asked was, how can both of those statements be
11 the truth? Which one is the truth and which one
12 is a lie?

13

14 **ACC:** The first statement that I said was the correct
15 one, the truth.

16

17 **APROS:** And which one was that?

18

19 **ACC:** The one that you are discussing now.

20

21 **APROS:** That you were born with your hand or that you
22 blew it off with a landmine?

23

1 **ACC:** It was blown off with a landmine.
2
3 **APROS:** No further questions.
4
5 **Presiding Officer:** Redirect.
6
7 **DC:** Mr. Barhoumi, have you ever told me that your
8 hand, that you were born with your hand like it
9 is now?
10
11 **ACC:** I never said this. I never told you this.
12
13 **DC:** And do you know what was printed in the press?
14
15 **ACC:** No, I do not, and if you review my papers, you
16 will not find anything related to that.
17
18 **DC:** Now we have met twice this week, is that correct?
19
20 **ACC:** Yes, this is correct.
21
22 **DC:** We met on Monday and then we met again on
23 Tuesday, correct?

1

2 **ACC:** Yes, this is correct?

3

4 **DC:** And on those 2 days, what were your feelings
5 about proceeding today?

6

7 **ACC:** I was really upset and I was really not happy. I
8 wanted to come here and meet with the judge and
9 talk to the judge about my condition. It is not
10 a good condition and I would like something to be
11 done.

12

13 **DC:** Did I spend most of the time on those 2 days
14 trying to convince you to let me ask the judge to
15 move you back to Camp 4?

16

17 **ACC:** Yes.

18

19 **DC:** And was it just this morning that you would allow
20 me to do that and it was then that we decided
21 that you would testify today?

22

23 **ACC:** Yes, this is true.

1

2 **DC:** Yesterday when we met, were you considering not
3 cooperating in this proceeding and perhaps
4 boycotting this proceeding because of your move
5 to Camp 5?

6

7 **APROS:** Objection. Relevance. It doesn't matter what he
8 was considering. He did, in fact, cooperate. He
9 did, in fact, do--he did allow this motion to go
10 forward. What he was thinking yesterday really
11 should have no bearing at this point.

12

13 **Presiding Officer:** Captain Faulkner?

14

15 **DC:** Sir, the government, in their questions, is
16 implying that Mr. Barhoumi and I have had these
17 extensive discussions about this motion, when the
18 fact of the matter is most of the time I spent
19 with him has been spent trying to convince him to
20 even go forward with the motion, not the
21 particulars of how we were going to litigate the
22 motion.

23

1 It goes to the very disruption of the attorney-
2 client relationship that this move to Camp 5 has
3 caused. Instead of spending productive time with
4 Mr. Barhoumi, I spend all of my time trying to
5 convince him to allow me to represent him and to
6 allow me to bring motions on his behalf and to
7 allow me to go forward in this proceeding.

8

9 **Presiding Officer:** Well it is pretty far a field but I am
10 inclined to give you the latitude to give you the
11 latitude on your motion. So, you may proceed and
12 ask the question.

13

14 **DC:** Mr. Barhoumi, as late as yesterday weren't you
15 considering not cooperating, not participating,
16 and perhaps boycotting this proceeding?

17

18 **ACC:** God only knows how confused I was against this
19 procedure and this motion. I wanted to boycott
20 the procedure. I was totally convinced that I
21 did not want to appear until yesterday, and the
22 day before yesterday, you talked with me a lot
23 and until I came in this morning into the room

1 outside this wall and I told him, "Okay, I will
2 give you the chance to help me and I will give
3 you the chance the defend me."
4
5 **DC:** Thank you, sir. I don't have any further
6 questions.
7
8 **Presiding Officer:** Any re-cross?
9
10 **APROS:** No, sir.
11
12 **Presiding Officer:** Thank you, Mr. Barhoumi, you may step
13 down and resume your place at the defense table.
14
15 [The accused did as directed.]
16
17 **Presiding Officer:** Captain Faulkner, you may proceed.
18
19 **DC:** Sir, the defense would request a brief recess. I
20 would like to consult with some of the members of
21 the media who may be here who may have written
22 that story and if they are here, I may, in fact,
23 call them to explain the discrepancy between what

1 was printed in the media and what was discussed
2 between me and my client.

3

4 **Presiding Officer:** What else do you have to present?

5

6 **DC:** I have nothing further, sir.

7

8 **Presiding Officer:** Does the government anticipate a
9 rebuttal case?

10

11 **APROS:** No, sir.

12

13 **Presiding Officer:** So it is your expectation that if you
14 are given some time, you may have a witness, you
15 may not, but at that time you are ready to argue
16 your motion?

17

18 **DC:** That is correct, sir.

19

20 **Presiding Officer:** Is the government ready to respond?

21

22 **APROS:** Yes, sir.

23

1 **Presiding Officer:** Very well, then I would like to do two
2 things; how long do you think you need Captain
3 Faulkner?

4

5 **DC:** I think I can determine if there is someone here
6 who can testify in probably 15 minutes or less,
7 sir. And, if they are going to testify I would
8 like to sit down with them briefly and just
9 discuss the basic nature of the testimony.

10

11 **Presiding Officer:** Does the prosecution need to do the
12 same?

13

14 **APROS:** Yes, sir.

15

16 **Presiding Officer:** All right, well it is 1420, that is
17 2:20 pm, I will give you 30 minutes. I would
18 like to see, however, I would like to see counsel
19 before you do that so that we can discuss the
20 order of proceedings for the rest of the day.

21

1 So, the Commission will be in recess, why don't
2 we say until 3 o'clock. The Commission is in
3 recess.

4

5 *The Commission Hearing recessed at 1421, 26 April 2006.*

6

7 *The Commission Hearing was called to order at 1503, 26*
8 *April 2006.*

9

10 **Presiding Officer:** This Military Commission is called to
11 order.

12

13 **APROS:** All parties present when the Commission recessed
14 are again present.

15

16 **Presiding Officer:** Captain Faulkner, you may proceed.

17

18 **DC:** Sir, the defense has no further evidence. I
19 would, however, like to clarify this issue about
20 the press conference. And offer a couple of
21 solutions. I did give a press conference during
22 the last trial session and I did make reference
23 to Mr. Barhoumi's defective hand. I just say

1 that and I say it--perhaps I said it inartfully.
2 There are news articles from that press
3 conference saying that I said, "He had a birth
4 defect." There are news articles saying that I
5 wouldn't comment on it. Whatever I said it was
6 obviously inartfully said, that being said, I've
7 talked to the Appointing Authority's Public
8 Affairs Officer and she's told me that there is a
9 tape of some sort of recording of that press
10 conference in D.C. If you think that it is an
11 important issue that needs to be resolved, we can
12 request that tape and try to get it down here as
13 soon as possible, if it's not, if it's not that
14 important to you, and I would just prefer to
15 "drive on."

16
17 **Presiding Officer:** Well, I will tell you that that
18 particular issue is not outcome determinative of
19 the motion that you presented. And I feel
20 entirely comfortable that I can resolve this
21 matter attributing to both of the witnesses that
22 they were telling the truth on all matters
23 related to this motion.

1

2 **DC:** Okay, sir.

3

4 **Presiding Officer:** With that, do you wish to be heard on
5 the motion?

6

7 **DC:** No, sir. Do I wish to argue?

8

9 **Presiding Officer:** Yes.

10

11 **DC:** I do, sir.

12

13 **Presiding Officer:** Very well. You may proceed.

14

15 **DC:** Sir, this motion is not about or not completely
16 about push button faucets and push button toilets
17 and the temperature at the various camps. What
18 this is about is pretrial punishment, punishment
19 for no reason. And if you look at Colonel B's
20 testimony, he gave primarily two reasons for the
21 move of the pre-commissioned detainees from Camp
22 4 to Camp 5.

23

1 The first is that they are experiencing some
2 downsizing, some consolidation, and the movement
3 of Mr. Barhoumi from Camp 4 to Camp 5 would allow
4 openings for other people to move to Camp 4. But
5 he didn't have an explanation for why it had to
6 be Mr. Barhoumi. Only that he was pre-
7 commissioned and he went then to the second prong
8 or his second reason for moving the detainees.
9 Colonel B cites to several Army regulations and
10 Geneva Convention III. And on this Geneva
11 Convention point, I would like to point out that
12 the government tends to invoke the Geneva
13 Conventions and Army regulations and the *Manual*
14 *for Courts-Martial* when it suits them and prefers
15 to disregard them when it doesn't suit them.
16
17 If we are going to follow Geneva Convention III,
18 the defense would welcome that. Let's follow it
19 and if we are going to follow it, let's follow it
20 to the letter of the law. And let's give Mr.
21 Barhoumi a court-martial and let's consider him a
22 prisoner of war and let's give him all the rights
23 to an appeal, as any service member would have,

1 as is required by the Geneva Conventions. Let's
2 provide him with the required number of francs
3 every day. Let's provide every detainee with two
4 hours of recreation, as is required by Geneva
5 Convention III.

6
7 But they often tend to invoke the Conventions
8 when they believe it suits their purposes.
9 However, Colonel B's invocation of Geneva
10 Convention III and AR 190-8 and AR 190-8 at
11 paragraph 3-7(h) essentially is a verbatim
12 transcription of Article 103 of Geneva Convention
13 III. And what it says there is that "a detainee
14 will not be confined while awaiting trial unless
15 a member of the U.S. Armed Forces would be so
16 confined if accused of a similar offense."

17
18 If that is what he is invoking, if that's the
19 provision that he is invoking, and it was clear
20 to me that that is the provision he was talking
21 about, then let's look at would a U.S. service
22 member be confined for committing a similar
23 offense? Pretrial confinement of U.S. service

1 members is governed by Rules for Court-Martial
2 305. And the government has to meet several
3 prongs in order to confine somebody under
4 pretrial confinement: "First, that an offense
5 triable by court-martial has been committed has
6 been committed, that the prisoner committed it,
7 and that confinement is necessary because it is
8 foreseeable 1) that the prisoner won't appear at
9 trial or 2) that the prisoner will engage in
10 serious criminal misconduct.

11
12 And the last prong is that less severe forms of
13 restraint are inadequate. Applying that law to
14 the facts in this case, Mr. Barhoumi, in order to
15 place him in pretrial confinement, would have to
16 either be a flight risk or likely to engage in
17 serious criminal misconduct.

18
19 He is apparently not likely to engage in serious
20 criminal misconduct because he, even by Colonel B
21 own assertion, was in a highly compliant status;
22 he's never had any problems with him. Mr.
23 Barhoumi has never made any threats towards

1 anyone. He's never tried to escape. And so it
2 doesn't appear that there's any assertion that
3 he's likely to engage in serious criminal
4 misconduct.

5
6 Whether or not he's a flight risk, apparently,
7 Camp 4 was sufficient to keep him from fleeing.
8 He's been at Guantanamo for almost 4 years. He
9 was in Camp 4 for about a year and he was never--
10 he never tried nor was he ever able to escape,
11 and that's the prong that the government can't
12 meet here. Camp 4 is a less severe form of
13 restraint. It's adequate. It achieves that
14 government's goals. It ensures the detainee's
15 presence at trial. It ensures that he's not
16 going to engage in serious criminal misconduct,
17 so if they want to invoke Geneva Conventions and
18 they want to follow Army regulations, fine. But
19 if that's what they're going to do, they're not
20 doing that in this situation.

21
22 In U.S. v. Crawford, cited in the defense brief,
23 the Court of Appeals for the Armed Forces says,

1 "We do not wish to convey the impression that we
2 condone arbitrary policies imposing maximum
3 custody upon pretrial prisoners. We will
4 scrutinize closely any claim that maximum custody
5 was imposed solely because of the charges rather
6 than as a result of a reasonable evaluation of
7 all the facts and circumstances of a case."

8
9 In this case, according to Colonel B., there was
10 no reasonable evaluation of all the facts and
11 circumstances. It was a blanket decision made to
12 move all Pre-Commission detainees into maximum
13 custody. It was an arbitrary decision and
14 there's no basis for his assertions. There's no
15 basis to believe that Mr. Barhoumi is in any
16 danger, that he's a danger to others, that he's a
17 flight risk, or that he's going to engage in any-
18 -any kind of serious criminal misconduct.

19
20 It was made--the decision to move him to maximum
21 custody was made solely because of the charges
22 and for no other reason. Because the
23 consolidation reason doesn't--doesn't hold up.

1 Any detainee could have been moved out of Camp 4
2 to make room for others if that's what they
3 wanted to do.

4
5 Mr. Barhoumi has suffered punishment as a result
6 of the move to Camp 5. You heard him say that
7 everyone in the camp knows that Camp 5 is for
8 punishment. According to Colonel B., there were
9 only five highly compliant detainees in Camp 5
10 and they were there for intelligence value.

11
12 Camp 4 is where the highly compliant detainees
13 are or they're in some other camp waiting for
14 their turn to get into Camp 4. Mr. Barhoumi's
15 already waited his turn. He's already made it to
16 Camp 4. He's done everything that was asked of
17 him. He participated in this Commission
18 proceedings and--and everything was progressing
19 along in an acceptable manner.

20
21 The government moves him to Camp 5 and all of a
22 sudden, things are made much more difficult for
23 his--for his attorneys--or for his attorney.

1 You heard Mr. Barhoumi say that we've spent the
2 last 2 days, me trying to convince him, let's
3 move forward, let's not boycott, let's you know
4 let's litigate this motion to try to get you back
5 to Camp 4. It wasn't spent talking about the
6 case, talking about which witnesses would be good
7 to call, talking about how best to counteract the
8 government's evidence that they have against him.
9 It was spent trying to convince him that I'm
10 trying to act in his best interest and trying--
11 trying to get moving and--and both days have been
12 spent trying to get him to even bring this motion
13 before this Commission.

14
15 Whether or not the government specifically
16 intended it, it's happened. Mr. Barhoumi feels
17 that it's punishment and it has had an impact on
18 our ability to discuss and come up and for him to
19 participate in his defense.

20
21 Sir, the defense respectfully asks that you order
22 the government to move Mr. Barhoumi back to Camp
23 4. Now, whether or not you have that authority

1 is of some question, but as the government
2 concedes in their--in their brief, you do have
3 the power to abate these proceedings until he is
4 moved back to Camp 4. If you don't believe that
5 you have the authority to order it, then we would
6 ask that you abate these proceedings until Mr.
7 Barhoumi is moved back to Camp 4.

8

9 Thank you.

10

11 **Presiding Officer:** Thank you. Does the prosecution wish
12 to be heard?

13

14 **APROS:** Yes, sir.

15

16 **Presiding Officer:** You may proceed.

17

18 **APROS:** Thank you, sir.

19

20 The defense has raised many allegations in its
21 brief none of which are backed by any credible
22 evidence. It's clear, after the testimony of
23 Colonel B. today, that the accused was not moved

1 for any retaliation for his cooperation in the
2 Commission's process. He was not moved in an
3 attempt to intentionally impact the accused's
4 attorney/client relationship. He was moved for a
5 security concern that the JTF, GTMO had based on
6 his change of status to a pre-trial detainee.

7
8 And while there is no doubt that the accused may
9 have enjoyed life more in Camp 4 than Camp 5, the
10 important thing for the Presiding Officer to
11 consider here is, is that change from Camp 4 to
12 Camp 5 impacting his right to a full and fair
13 trial? Because, sir, that--that is your mandate,
14 to ensure that he has a full and fair trial and
15 there's nothing in the record that indicates in
16 anyway that the accused will not enjoy a full and
17 fair trial now that he is housed at Camp 5.

18
19 The accused testified and the very fact that
20 we're here and that we've litigated this issue
21 and that it was obviously very well prepared by
22 the defense and that the accused was able to
23 testify, shows that the attorney/client

1 relationship is not broken. There is no impact
2 that would prohibit the accused from receiving a
3 full and fair trial. This very fact that we're
4 here is the very best evidence of that, sir.

5
6 The defense cites to U.S. verse Crawford and U.S.
7 verse Crawford is clear for the proposition that
8 custody is not arbitrary when it relates to a
9 security need. And Colonel B. clearly testified
10 that it was the security that was the--his
11 primary concern, and he articulated his reasons
12 why and why there's a general concern when
13 someone's about to go to trial that either he may
14 be a risk to himself or he may have a risk to his
15 security from others.

16
17 And while the accused--while there may not be any
18 very specific threat against the accused, the
19 problem in these situations is you don't know
20 until it's too late. You don't know that there's
21 a threat against the accused in Camp 4 until he's
22 laying there in his own pool of blood, and the
23 JTF is charged with detaining these individuals

1 humanely and they're charged with ensuring their
2 safety and security. And quite frankly, sir,
3 that's the JTF's call. That's Colonel B.'s job,
4 and he needs to be given great difference in his
5 decision on where to move these detainees in
6 order to maximize their security. That's what he
7 did when he chose to move everybody from--any--
8 everybody that is in a Pre-Commission status to
9 Camp 5.

10
11 So through the testimony of Colonel B., through
12 the testimony of the accused today, the accused's
13 ability to help in his own defense has not been
14 impacted. Even by his own admission, he's able
15 to get everything he needs. He has all of his
16 materials. He's able to meet with his defense
17 counsel in the same exact circumstance as he was
18 able to meet with him prior to his move.

19
20 The defense has the burden here to show that his-
21 -that his right to a full and fair trial, which
22 is his right and his only right we're talking
23 about today, has been impacted in some way, and

1 the evidence simply shows that it hasn't. He's
2 being detained humanely and the government's
3 position is that the defense motion should be
4 denied, sir.

5

6 **Presiding Officer:** Thank you. Captain Faulkner, you've
7 got the burden of proof on this. Would you like
8 to have the closing comment?

9

10 **DC:** I would, sir, if I could just address a couple of
11 things that the government said.

12

13 In speaking about a full and fair trial, the
14 government noted that this was a well-prepared
15 motion and that the--Mr. Barhoumi was able to
16 participate. Well, this is a legal motion raised
17 mostly on research done on my part, work done
18 primarily on my part, and that--that wasn't
19 impacted, but the fact that it took me until this
20 morning to even be able to discuss with Mr.
21 Barhoumi his testimony today and today wasn't
22 relatively difficult testimony, it didn't take a
23 lot of preparation to get him ready to testify,

1 but if you extrapolate that down the road where
2 specific factual issues are going to come up and
3 I'm going to need more information from Mr.
4 Barhoumi, if all of my time is spent explaining
5 to him, trying to get him to participate, trying
6 to get him to cooperate, trying to explain to him
7 that this movement to Camp 5 is not punishment,
8 then the ability for a full and fair trial will
9 be impacted.

10
11 The government pointed out that there's a
12 general--that Colonel B. noted a general concern
13 when people go to trial. But that's not what
14 Crawford says. Crawford says, "a determination
15 to place someone in maximum custody must be made
16 on a reasonable evaluation of all the facts and
17 circumstances in each case." And Colonel B.
18 himself said, he doesn't care if it's a hundred,
19 200, 300, or 490 personnel going before
20 Commission, they're all going to maximum custody.
21 He's not looking at each individual case as he's
22 charged to do under Crawford. It's his opinion,
23 his arbitrary opinion that people facing

1 Commission ought to be in maximum custody solely
2 because they're facing Commission and not based
3 on any reasonable evaluation of the facts and
4 circumstances of each case.

5
6 The government pointed out, it was simply the
7 change of status that precipitated this move to
8 Camp 5. It wasn't anything that Mr. Barhoumi
9 did. Presumably, if there was no Commission, Mr.
10 Barhoumi would still be in Camp 4. It was an
11 arbitrary decision and it was not based on any
12 evaluation of the facts and circumstances of Mr.
13 Barhoumi's case; and, therefore, we would request
14 that you grant the defense motion.

15
16 **Presiding Officer:** Thank you. Before I recess to consider
17 this motion, I would like to thank counsel and
18 complement you on the motions, the timeliness of
19 them and their thoroughness of them as well as
20 your preparation and presentation this morning
21 and this afternoon and your arguments,
22 particularly yours Captain Faulkner on behalf of
23 your client.

1

2 It's 1525, that's 3:25 p.m. I understand this is
3 a matter of some urgency, so I don't wish to
4 delay making a ruling so that your client will
5 know where he stands; however, I do need some
6 time to consider these issues. My intention is
7 to retire to chambers for some period of time and
8 issue a memorandum ruling today. I think it
9 would be useful to place that on the record, so
10 my expectation is that I could be ready to do
11 that in probably slightly over an hour, so I
12 would ask you to stand by for us to come back on
13 the record so that we can take care of that
14 before we recess for the day.

15

16 Does either side anticipate any other business
17 before the Commission this afternoon?

18

19 **APROS:** The government does not, sir.

20

21 **DC:** No, sir.

22

1 **Presiding Officer:** Very well. The commission is in
2 recess.
3
4 *The Commission Hearing recessed at 1523, 26 April 2006.*

1 *The Commission Hearing was called to order at 1640, 26*
2 *April 2006.*

3

4 **Presiding Officer:** This Commission is called to order.

5

6 **APROS:** All parties present when the Commission recessed
7 are again present.

8

9 **Presiding Officer:** In the interests of addressing this
10 urgent matter, I am entering this summary ruling
11 and I will enter my complete findings into the
12 record at a later date.

13

14 Among those findings will be the following, which
15 I find by a preponderance of the evidence:

16

17 The transfer of the accused from Camp 4 to Camp 5
18 was one transfer among others included in the
19 framework of a large reorganization and
20 assignment plan.

21

22 The plan which resulted in the transfer of the
23 accused was among several options staffed by the

1
2 directorates within the Joint Task Force and
3 briefed to the Commanding General.
4

5 The plan, ultimately approved by the Commanding
6 General was recommended by the Commander Joint
7 Detention Group. Several goals were the object
8 of the reorganization plans, including the
9 closing of Camps 2 and 3, the co-location of
10 detainees pending trial by Military Commission,
11 and the maximization of staff and resources,
12 including the 175 beds in Camp 4, which were
13 used, in part, as an incentive to detainees who
14 were highly compliant in obeying camp rules.
15

16 As part of the approved plan the Joint Detention
17 Group Commander recommended co-locating the pre-
18 commission detainees in Camp 5. This was
19 recommended in order to bring camp operations
20 into line with what the Commander viewed as
21 guidance from Army regulations as informed by the
22 principals articulated in the III Geneva
23 Convention. Neither the Army regulations nor the

1 III Geneva Convention are directly applicable to
2 the unique circumstances of the Guantanamo Bay
3 detainees, but the Commander referred to them as
4 the best available guidance in structuring the
5 detention camps.

6
7 The Joint Detention Group Commander's specific
8 concerns about the pre-commission detainees were
9 their safety and their security.

10
11 In his experience of 24 years as a military
12 policeman, the Commander believed that the pre-
13 commission detainees were in a vulnerable
14 analogous to more traditional pretrial detainees
15 pending criminal trials.

16
17 These detainees, in his judgment, require a
18 maximum-security facility to ensure their safety
19 and security while going through the trial
20 process.

21
22 The Joint Detention Group Commander testified
23 that all pre-commission detainees, except two,

1 for reasons not germane to this case, are now co-
2 located in Camp 5, and all future detainees
3 charged and referred to trial before a Military
4 Commission will be co-located in Camp 5 for the
5 reasons stated.

6
7 The co-location of pre-commission detainees also
8 facilitated the reassignment of other detainees
9 to Camp 4, which were needed to accomplish camp
10 consolidation.

11
12 Briefly stated, Camp 4 is a medium-security
13 facility while Camp 5 is a maximum-security
14 facility. While there are certainly qualitative
15 differences in the standard of living between the
16 two camps, as well as security differences, there
17 is no evidence that the transfer of this accused
18 from Camp 4 to Camp 5 was done with an intention
19 to punish him, or to interfere with the
20 meaningful exercise of his right to counsel.

21
22 With respect to access to counsel, Camps 4 and 5
23 provide the same level of access and require the

1 same procedures to meet with counsel. A request
2 is processed, and when approved, counsel are
3 permitted to meet with their client at Camp Echo,
4 which provides an environment conducive to such
5 meetings.

6
7 Thus, there was no change in the accused's actual
8 access to counsel as a result of his transfer
9 from Camp 4 to Camp 5.

10
11 In transferring the accused from Camp 4 to Camp
12 5, there was no intent on the part of detention
13 facility officials to punish the accused or to
14 interfere with his meaningful exercise of his
15 right to counsel.

16
17 Fairness dictates that this Commission determine
18 whether the transfer of the accused from Camp 4
19 to Camp 5, with its attendant change and
20 circumstances, was imposed for the purpose of
21 punishment or to interfere with the accused's
22 meaningful exercise of his right to counsel or

1 whether the transfer is merely an incident of
2 some other legitimate governmental purpose.

3
4 Absent a showing of an intent on the part of
5 detention officials to punish or interfere with
6 the accused's access to counsel, that
7 determination depends on whether the transfer and
8 the change in conditions of his detention is
9 reasonably related to a legitimate governmental
10 objective. Ensuring security and order at a
11 confinement facility is a permissible nonpunitive
12 governmental objective.

13
14 In determining whether a transfer and change in
15 living conditions are reasonably related to a
16 legitimate governmental interest, United States
17 courts acknowledge that maintaining security and
18 order and operating a detention facility in an
19 orderly fashion are matters peculiarly within the
20 providence and professional expertise of
21 corrections officials.

1 In the absence of substantial evidence in the
2 record to indicate that the officials have
3 exaggerated their response to these
4 considerations, court should ordinarily defer to
5 their expert judgment in such matters, even when
6 applying United States Constitutional standards.

7
8 Indeed, U.S. courts resolving issues where the
9 United States Constitution is fully applicable
10 accord prison administrators wide range and
11 deference in the adoption and execution of policies
12 and practices, that in their judgment, are needed
13 to preserve internal order and discipline and to
14 maintain institutional security.

15
16 Since there was no evidence that the transfer and
17 its related change in living conditions was
18 employed by JTF officials with an intent to
19 punish this detainee or to interfere with his
20 meaningful exercise of the right to counsel, the
21 transfer and the related changes in conditions
22 were responses by officials to legitimate and
23 clearly articulated security concerns.

1

2 Having been fully staffed and approved by those
3 officials charged with the responsibility for
4 administering the camps with clear goals to which
5 the transfers and related security changes were
6 rationally related, the decision to transfer pre-
7 commission detainees, including this accused, was
8 not arbitrary.

9

10 The fact that the new security requirements
11 interfere with the accused's understandable
12 desire to live as comfortably as possible and
13 with as little restraint as possible during
14 detention does not convert the conditions or the
15 restrictions of detention into a punishment, even
16 though he actually feels that he has been
17 punished. Therefore, the defense motion for
18 relief is denied.

19

20 Ordinarily we would next move to consider a trial
21 order and matters to be resolved at the next
22 session of the Commission but in light of Mr.
23 Foreman's absence, counsel, my preference will be

1 to try to engage him in that and do that in
2 writing following this session.
3
4 What is the prosecution's position on that?
5
6 **APROS:** The prosecution agrees, sir.
7
8 **Presiding Officer:** Captain Faulkner?
9
10 **DC:** That is fine with us, sir.
11
12 **Presiding Officer:** Very well. Is there any other business
13 to be attended to today?
14
15 **APROS:** Not from the government, sir.
16
17 **DC:** No, sir.
18
19 **Presiding Officer:** Very well. This Commission is in
20 recess.
21
22 *The Commission Hearing recessed at 1650, 26 April 2006.*

**AUTHENTICATION OF
FINAL SESSION TRANSCRIPT**

in the case of:

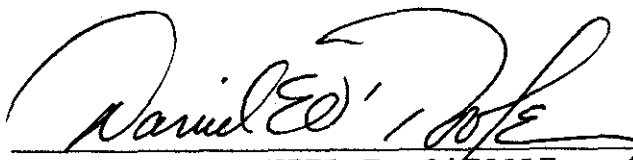
United States v. Sufyian Barhoumi

a/k/a/ Abu Obaida

a/k/a Ubaydah al Jaza'iri

a/k/a Shafiq

This is to certify that the Pages 20 through 218
(includes this authentication page) are an accurate and
verbatim transcript of the proceedings held in the
above styled case on April 26, 2006.



DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

30 May 2006
DATE